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Saint Alphonsus Diversified Care, Inc. v. MRI Associates, LLP Respondent's Brief 2 Dckt. 34885

IN THE SUPREME COURT OF THE STATE OF IDAHO

SAINT ALPHONSUS DIVERSIFIED CARE, INC., an Idaho nonprofit corporation,
Plaintiff-Appellant,

v.

MRI ASSOCIATES, LLP, an Idaho limited liability partnership,
Defendant-Respondent

MRI ASSOCIATES, LLP, an Idaho limited liability partnership, on its own behalf, and on behalf of MRI Limited, an Idaho limited partnership, and MRI Mobile Limited, an Idaho limited partnership,
CounterClaimant-Respondent

v.

SAINT ALPHONSUS DIVERSIFIED CARE, INC., an Idaho nonprofit corporation; SAINT ALPHONSUS REGIONAL MEDICAL CENTER, INC.
CounterDefendants-Appellants

Supreme Court
Docket No. 34885

RESPONDENT'S REPLY IN SUPPORT OF CROSS-APPEAL

Appeal from the District Court of the Fourth Judicial District for Ada County
Honorable Michael R. McLaughlin, District Judge, Presiding

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Respondent/Cross-Appellant MRI Associates, LLP ("MRIA"),[1] hereby submits its reply brief in support of its cross-appeal.

I. ARGUMENT

As indicated in MRIA's opening brief, if SARMC's[2] request for a new trial is denied on appeal, the Court need not address MRIA's cross-appeal. MRIA only seeks to appeal the following rulings if the Court determines that a new trial is warranted. In the event SARMC is granted a new trial, the trial court's denial of MRIA's motion for leave to seek punitive damages should be reversed as there is overwhelming evidence that (1) SARMC acted in extreme deviation from reasonable standards of conduct when it willfully and deliberately competed with its partners in MRIA and that (2) SARMC did so with full knowledge that its conduct would result in the destruction of MRIA's business. Additionally, in the event SARMC is granted a new trial, the trial court's grant of summary judgment on MRIA's antitrust claims should also be reversed because MRIA sufficiently asserted an antitrust injury and showed that SARMC and Intermountain Imaging ("IMI") had market power.

A. The Trial Court Abused Its Discretion When It Denied MRIA's Request for Leave to Seek Punitive Damages.

The overwhelming evidence clearly and convincingly demonstrates that SARMC, while still a partner in MRIA, deliberately competed with MRIA in violation of SARMC's contractual and fiduciary duties. SARMC did so with willful disregard for the consequences of its wrongful

[1] References to MRIA also include its business arms: MRI Limited Partnership aka MRI Center of Idaho ("MRICI") and MRI Mobile ("MRIM").
[2] References to SARMC include both Saint Alphonsus Diversified Care, Inc. and Saint Alphonsus Regional Medical Center.

conduct. As a result, MRIA's business was destroyed. (Trial Ex. 4519.) The evidence further demonstrates that the trial court's failure to instruct on punitive damages "was so contrary to the facts of the case as to amount to an abuse of discretion under the deferential standard." *General Auto Parts Co., Inc. v. Genuine Parts Co.*, 132 Idaho 849, 825, 979 P.2d 1207, 1210 (1999).

1. Punitive Damages Are Appropriate in a Commercial Context.

SARMC suggests that punitive damages are not warranted because "wrongful dissociation is no different than a breach of contract, which does not give rise to punitive damages." (SARMC's Reply Brief at 42.) SARMC, however, is wrong. As this Court held in *Myers v. Workmen's Auto Ins. Co.*, 140 Idaho 495, 95 P.3d 977 (2004), "[i]t is not the nature of the case, whether tort or contract, that controls the issue of punitive damages." What controls is whether SARMC's conduct was oppressive, fraudulent, malicious or outrageous. I. C. § 6-1604(1).

According to this Court, I.C. § 6-1604(1) "requires an intersection of two factors: a bad act and a bad state of mind." *Linscott v. Ranier Nat'l Life Ins. Co.*, 100 Idaho 854, 858, 606 P.2d 958, 962 (1980). The Court recognized that in the past it had used various terms to describe the "bad act" requirement such as "deceit," acting "to violate another's legal right," acting "for purpose of injuring plaintiff," "to oppress," acting "(in) disregard . . . of the known property rights," and "fraud." *Id.* The Court also recognized it had used the following terms to describe a "bad state of mind": "deliberate," and "gross negligence." *Id.*; *see also Cheney v. Palos Verde Inv. Corp.*, 104 Idaho 897, 905, 665 P.2d 661, 669 (1983) (holding the bad state of mind can be shown if the act was simply "deliberate or willful"). The Court then noted "[i]n two cases

involving breach of a contract, this court even held that it was proper to award punitive damages when there was 'other sufficient reason.'" *Linscott*, 100 Idaho at 858, 606 P.2d at 962; *see also Rockefeller v. Grabow*,136 Idaho 637, 646-47, 39 P.3d 577, 586-87 (2001) (recognizing a punitive damages amendment is proper where there is evidence of violations of fiduciary duties); *Cuddy Mountain Concrete Inc. v. Citadel Constr., Inc.*, 121 Idaho 220, 229, 824 P.2d 151, 160 (Idaho Ct. App. 1992) (recognizing punitive damages are proper when a party breaches it duty to act in good faith).

Thus, a breach of contract may give rise to punitive damages where the conduct "show[s] a lack of professional regard for the consequences of the breach of the contractual agreement." *Cuddy Mountain*, 121 Idaho at 229, 824 P.2d at 160. Stated simply, punitive damages are proper when the conduct is willful or deliberate regardless of the type of claim. *Cheney v. Palos Verde Inv. Corp.*, 104 Idaho 897, 905, 665 P.2d 661, 669 (1983). Here, SARMC's actions were willful, deliberate, and much more egregious than a mere breach of contract. SARMC, in willful violation of its fiduciary and contractual duties and with conscious disregard for the consequences of its actions, competed with its partners in MRIA and took other actions which caused the financial ruin of MRIA.

2. The Standard of Review for Determining Whether the Trial Court Abused Its Discretion is Substantial Evidence.

Although SARMC is correct that the decision of whether to submit the issue of punitive damages to the jury is reviewed under abuse of discretion, "[t]his Court has interpreted the abuse of discretion standard in the context of punitive damages as whether there was substantial

evidence to support submitting the issue to the jury." *Highland Enterprises Inc. v. Baker,* 133 Idaho 330, 348, 986 P.2d 1011, 1014 (1999) (citing *Student Loan Fund of Idaho Inc. v. Duerner,* 131 Idaho 45, 52, 951 P.2d 1272, 1279 (1998) ("On appeal, we will not disturb the trial court's decision unless there was an abuse of discretion, which has been interpreted within the punitive damages context to mean whether there was substantial evidence to support submission of the issue to the jury.")); *see also Rockefeller v. Grabow*,136 Idaho 637, 647, 39 P.3d 577, 587 (2001) ("In determining whether the trial court abused its discretion this Court will consider whether substantial evidence supports submitting the issue [of punitive damages] to the jury."). Thus, even though the standard is deferential, the law requires the trial court's decision to be reversed if substantial evidence supported submitting the issue to the jury.

3. The Issue of Punitive Damages Should Have Been Submitted to the Jury Because There Was Substantial Evidence that SARMC Committed a "Bad Act" with a "Bad State of Mind."

In this case, the issue of punitive damages should have been submitted to the jury because there was clear and convincing (not just substantial) evidence that SARMC "deliberately" or as the trial court described, "blatantly" (the bad state of mind) competed with its partner MRIA and "violated [MRIA's] legal right[s]" (the bad act). (TR Vol. III at 4471:9-17.) The evidence demonstrates that SARMC's conduct, which the Jury found to be intentional and in bad faith, was an extreme deviation from the reasonable standard of care and was taken without professional regard for the consequences of the conduct. (R., Ex. 48 at ¶¶ 17-28, attached as Ex. A to Reply Appendix (Reply App.") attached hereto.) The evidence further demonstrates that SARMC's wrongful conduct was more egregious than merely breaching a contract, as SARMC

erroneously contends.

a. SARMC Willfully and Knowingly Breached Its Fiduciary Duties to Its Partners and Breached the MRIA Partnership Agreement.

As fully set forth in prior briefing, SARMC wrongfully withdrew from MRIA on April 1, 2004. (R. Vol. II at 388-96, Vol. III at 538-46.) Moreover, it is not as if SARMC withdrew for a benign purpose. Instead, it withdrew because it had joined MRIA's competitor, IMI. (Trial Ex. 4226.) Furthermore, at the time of its wrongful withdrawal from MRIA, SARMC knew that by dissociating for purposes of competing with MRIA it would be violating the express terms of the MRIA Partnership Agreement. This knowledge is evidenced by the clear language in the MRIA Partnership Agreement (including the withdrawal and noncompete provisions), the analysis of SARMC's consulting firms and the admonitions from SARMC's attorneys.

For example, SARMC was warned by PriceWaterhouseCoopers in January 2000 (over four years before its wrongful withdrawal) that the MRIA Partnership Agreement restricted the right of SARMC to withdraw from MRIA. (Trial Ex. 4138 at 16 attached as Reply App. Ex. B; R. Vol. II at 388-96, Vol. III at 538-46.) SARMC also was reminded by its consultant Shattuck Hammond that "SARMC ha[d] been advised by counsel that this option [withdrawal from MRIA] would likely engender litigation with MRIA.... Givens Pursley believes that that there would likely be litigation as to whether the termination was wrongful...." (Trial Ex. 4239 at 2, 11.) The evidence established that SARMC fully understood the legal implications of these warnings. (TR. Vol. II at 1950:10-15; TR Vol. III at 3594:9-13; 3595:23-3596:6.)

SARMC also knew its involvement in IMI, while still a partner in MRIA, violated

SARMC's fiduciary duties to MRIA. Indeed, SARMC's CEO testified that she understood that (1) "a partner must not help a third party compete with the partnership", (2) "a partner must not compete with the partnership", (3) "one of a partner's responsibilities to his other partners is not to exploit his position", (4) "a partner must not profit at the partnership's expense", and (5) "a partner must not exploit information obtained through his position as a partner." (TR Vol. II at 1686:7-13, 23-25; 1684:2-5; 1680:1-4; 1685:12-15; 1682:6-18.) Despite this knowledge, SARMC, under the leadership of its CEO, not only helped a third-party compete with the partnership, but it also later joined that third-party competitor, competed with the partnership itself, and ultimately profited at the partnership's expense. Likewise, SARMC's Chief Operating Officer, Cindy Schamp, admitted that in 2001 she learned from SARMC's consultants that competing with MRIA through IMI could be a breach of SARMC's fiduciary duties. (TR Vol. III at 3593:21-3594:16.) Similarly, SARMC understood (by no later than 2001) that SARMC's conduct created "*a risk of St. Alphonsus breaching its fiduciary responsibility to [MRICI and MRI Mobile].*" (Trial Ex. 4239 at 11 (emphasis added).) This evidence clearly establishes the "bad state of mind" requirement.

b. SARMC Also Wilfully Supported and Joined a Competitor While Still a Partner in MRIA with Knowledge of, and Disregard for, the Consequences to MRIA.

In addition to wrongfully withdrawing, SARMC's willful bad acts, while still a partner in MRIA, include:

- Helping IMI establish itself as a MRIA's competitor;

- Usurping MRIA's opportunity to partner with GSR/IMI[3];
- Formally partnering with IMI and providing IMI with significant financial support;
- Actively joint marketing with IMI to shift referrals from MRIA to IMI;
- Making IMI its outpatient facility;
- Condoning conduct by GSR which caused referrals to shift from MRIA to IMI;
- Refusing to allow MRIA to contract with radiologists other than GSR;
- Bringing IMI onto SARMC's campus virtually next-door to MRICI; and
- Issuing a written mandate to all of its employees, including referring physicians, directing that all patients be sent to the IMI magnet rather than to MRICI.

This conduct, which is described in more detail below, clearly and convincingly demonstrates that SARMC deliberately competed with MRIA in violation of SARMC's contractual and fiduciary duties. SARMC knew or should have known that its conduct would destroy MRIA, both in terms of lost revenues and the substantial fees and costs that MRIA would have to incur in order to enforce its legal rights under the partnership agreement. (TR Vol. II at 1690:20-1691:5; 1871:8-9.) SARMC's knowledge of, and professional disregard for, the consequences of its wrongful conduct is aptly summarized by SARMC's CEO's testimony: "I was a partner with

[3] References to "GSR" include St. Alphonsus Radiology Group n/k/a Gem State Radiology. GSR was the exclusive reader of SARMC's radiologic images including MRICI's images. (TR Vol. II at 1446:10-1447:2.

a competitor. I was supporting myself." (TR Vol. II at 1871:8-9.)[4]

i. SARMC Supported the Establishment of MRIA's Competitor, IMI.

While still a partner in MRIA, SARMC knowingly helped IMI become a lethal competitor of MRIA by investing money and resources into the establishment of IMI. SARMC's support during IMI's initial start-up included: (1) providing the backing necessary for IMI to obtain funding; (2) providing SARMC's case volume, database, technical component charges, staffing costs, and other operational data for IMI's use in its business plan; (3) linking IMI to the intranet between SARMC and its physician network; (4) supporting Karen Noyes, assistant director of the SARMC radiology department, in joining IMI as executive director; and (5) converting SARMC to the same digital radiography system as IMI. (Trial Ex. 4095 attached as Reply App. Ex. C; *see also* Trial Ex. 4074 (showing in February 1999, SARMC was working on funding for IMI)). In fact, without SARMC's help, IMI likely would not have obtained financing. (Trial Ex. 545 at 3, attached as Reply App. Ex. D ("[F]inancing [for IMI] was *contingent on* a partnership with the hospital." (emphasis added)).

ii. SARMC's IT Support Provided IMI with a Tremendous Competitive Advantage.

Although still a partner in MRIA, SARMC partnered with GSR, from IMI's inception, to convert IMI's technology from film to digital imaging. SARMC helped bring this "digital

[4] The evidence set forth in the proceeding sections was in large part the same evidence submitted with MRIA's motion for leave to seek punitive damages, which motion was renewed at the close of the evidence. (*See* R., Ex. 47 at 1-20; R. Ex. 48 at ¶¶ 17-28; R., Exs. 68 & 69.)

revolution to IMI" by initially investing several hundred thousand dollars in IMI's IT system. (TR Vol. II at 1505:10-1507:10; Trial Ex. 4095, attached as Reply App. Ex. C.) The investment by SARMC in "dark fiber" connectivity to IMI, alone, was $780,000. (Trial Ex. 4231at 3 attached as Reply App. Ex. E; TR Vol. II at 1509:6-13.) SARMC also provided technical resources to IMI, including the formation of a joint IT committee with IMI, which MRIA was not allowed to join. (*Id.* at 1619:12-1621:20; 2437:18-2439:9.) Consequently, this support provided IMI with an enormous competitive advantage over MRICI. (Ex. 4107, attached as Reply App. Ex. G; TR Vol. II. 1618:22-1619:3, 1497:15-1502:24.)

iii. SARMC Usurped MRIA's Opportunity to Partner with GSR/IMI.

As set forth in MRIA's opening brief, MRIA had an opportunity to partner with GSR in IMI rather than compete with IMI. In that regard, in June 1999, MRIA asked SARMC's CEO, Sandra Bruce, to help MRIA close the deal with GSR. (TR Vol. II at 1164:2-1165:16, 1759:24-1760:14.) Although Bruce agreed to help, instead of negotiating on MRIA's behalf, she put the MRIA negotiations on hold and then offered GSR a better deal: a 50% interest in an MR imaging business rather than the 9% (one-eleventh) interest offered by MRIA. (*Id.* at 1165:8-1166:16, 1760:3-1761:18, 1769:7-10, 1788:19-1790:15, 1786:15-19, 2043:24-2044:5, 2371:4-10, 3702:9-11, 4171:13-21; Trial Ex. 4101; Trial Ex. 4191 at 3.) It is not surprising that GSR accepted SARMC's better offer and partnered with SARMC instead of MRIA. (Trial Ex. 4226). By this conduct, SARMC, while still a partner in MRIA, deliberately took for itself an opportunity

belonging to MRIA.[5]

iv. SARMC Formally Partnered with IMI and Provided IMI with Significant Financial Support.

In June, 2001, while still a partner in MRIA, SARMC formally joined as a partner with GSR in IMI and received a 50 percent interest in IMI. (Trial Ex. 4226 at 6.) At that time, SARMC gave IMI $546,146 and assumed almost $1.5 *million* of IMI's debt. (TR Vol. II at 1557:4-1558:2; 1622:22-1623:8.) This financial support was in addition to SARMC's financial investment in IMI's IT systems.

v. SARMC Actively Competed With Its Partners in MRIA by Joint Marketing with IMI to Shift Referrals from MRIA to IMI.

Even though IMI was MRIA's main competitor and even though SARMC as a partner in MRIA owed MRIA a duty not to compete, SARMC actively worked with IMI to obtain a combined market share for magnetic resonance imaging, in direct competition with MRIA. (Trial Ex. 4248 attached as Reply App. Ex. F; TR Vol. II at 1643:7-13, 1646:1-7; TR Vol. III at 4169:10-17.) SARMC and IMI jointly marketed by television, radio, newspapers, letters to referring physicians and physician-to-physician office visits. (Trial Exs. 4248 & 4107 attached as Reply App. Exs. F and G; TR Vol. II at 1643:23-1644:22.) This joint marketing caused confusion among the referring doctors as to which imaging center was affiliated with SARMC. (*Id.* at 2420:11-16; 2428:21-2429:6.) As a result, marketing for MRIA became difficult. (*Id.*)

[5] SARMC, while still a partner in MRIA, also usurped MRIA's opportunity to open an imaging center in Meridian, Idaho by helping open IMI Meridian (AKA IMI West). (Trial Exs. 4156, 4115, 4211 & 4275; TR Vol. II at 1590:11-23; 1613:5-12; 1615:20-23.)

vi. SARMC Ensured that IMI was Viewed by the Referring Physicians as SARMC's Imaging Center.

In addition to joint marketing with IMI, SARMC, while still a partner in MRIA, made IMI SARMC's outpatient facility which ensured that IMI (not MRIA) would be viewed by referring physicians as SARMC's imaging center. (*Id.* at 1582:10-1583:24.) Because this development was communicated to the referring doctor community (the source of MRIA's business), MRIA lost scans because referring physicians became "used to sending patients to IMI, not just for CT, but for MRI as well." (*Id.* at 1583:17-24.)

vii. SARMC Allowed Its New Partner GSR to Engage in Conduct Intended to Shift Referrals from MRIA to IMI.

Shortly after IMI opened in late 1999, GSR began to reduce its services to MRICI and otherwise began engaging in conduct detrimental to MRICI. (TR Vol. II at 1176:19-1180:7.) Consequently, MRIA requested SARMC to intervene and return radiologist service to its previous, professional level:

> The time has come for SARMC to insist on and provide full, supportive radiologic coverage of the lab at historical levels of professionalism and service. . . . [Such coverage] cannot be allowed to be withdrawn simply because the radiologists of the lab are now also its competitors. The highest standard of care for patients is essential and includes having radiologists on site to supervise studies as needed. We now view as a necessity SARMC's providing the lab with full, supportive, traditional radiologist coverage or permitting the MRI Center of Idaho to contract directly with radiologists as a fiduciary responsibility of SARMC to its other general and limited partners.

(Trial Ex. 4137 at 2 attached as Reply App. Ex. H; *see also* TR Vol. II at 1176:19-1180:7.) SARMC, although still a partner in MRIA, never responded to MRIA's request. (TR Vol. II at 1182:9-14.) Indeed, as SARMC's relationship with GSR in IMI intensified, the GSR

radiologists became bolder in their unfair tactics by (1) unilaterally reducing weekday hours at MRICI, while increasing IMI's hours of service for its MRI modality, and (2) cancelling all weekend support to MRICI, except for emergency cases. (*See,* Trial Ex. 4277 & 4309 at 3-4, 2 attached as Reply App. Ex. I and J; TR Vol. II at 1217:11-1219:8; 1653:23-1655:25; 1924:3-20; 2195:2-7; 2392:5-24) Consequently, MRIA lost a substantial portion of its scan volume to IMI. (TR Vol. II at 2633:8-2634:4; 2742:13-2743:6; 2796:15-2797:1; 2877:25-2878:3; Trial Ex. 4247 at 13, Trial Ex. 4519 attached as Ex. D to the Appendix to MRIA's opening brief.) Again, SARMC refused to help because by supporting IMI, it was supporting itself. (TR Vol. II at 1871:8-9.)

viii. SARMC Refused to Allow MRIA to Contract with Other Radiologists.

After usurping MRIA's opportunity to partner with GSR in IMI, SARMC then helped further destroy MRIA's business by forcing MRIA to have its images read by its competitor, GSR (one of the owners of IMI), thereby allowing MRIA's competitor to interface with MRIA's referring physicians. (Trial Ex. 4137 at 2, attached as Reply Ex. H; TR Vol. II at 1488:8-1489:3.) When MRIA requested SARMC's permission to "contract directly with radiologists" who were not MRIA's competitors, SARMC, although still a partner in MRIA, ignored such requests. (TR Vol. II at 1175:23-1176:11, 1182:9-14; Trial Ex. 4137, attached as Reply App. Ex. H.) Essentially, SARMC insisted on using the fox to guard the henhouse.

ix. SARMC Moved an IMI Magnet Onto Its Campus and Ordered SARMC Physicians to Use IMI Instead of MRIA.

SARMC delivered a one-two death blow by opening an IMI magnet on its campus next

to MRICI and by issuing a written mandate to all of its employees, including referring physicians, directing that all patients be sent to the IMI magnet rather than to MRICI. (TR Vol. II at 2173:21-24; Trial Ex. 4377, attached as Reply App. Ex. K.) This mandate along with SARMC's other misconduct, reduced the MRICI business of MRIA to an almost bankrupt company. (Trial Ex. 4519, attached as Ex. D to the Appendix to MRIA's opening brief.)

4. SARMC's "Scorched Earth Scenario."

Among the evidence before the trial court when ruling on MRIA's motion was the statement by SARMC's consultant that "SARMC has referred to [withdrawal from MRIA] as their 'scorched earth scenario.'" (Trial Ex. 4239 at 11; R. Vol. IX at 2116-18). This "scorched earth scenario," as demonstrated by the evidence, was the strategy that SARMC ultimately pursued in its relationship with MRIA. The fact that SARMC referred to the strategy as the "scorched earth scenario" is very telling concerning SARMC's state of mind. It establishes that SARMC's withdrawal and competition with its partners was done willfully, deliberately, maliciously and with the intent to harm MRIA.[6]

5. SARMC's Conduct Constitutes an Extreme Deviation from Normal Standards of Conduct.

SARMC erroneously asserts that there was no evidence that SARMC's conduct constituted an extreme deviation from reasonable standards of conduct. Contrary to SARMC's assertion, the evidence set forth above and set forth more fully in MRIA's opening brief,

[6] That the trial court went out of its way to prevent the jury from being prejudiced is demonstrated by the trial court's decision, after it ruled upon MRIA's motion, to exclude from the jury any reference to "scorched earth." This fact belies SARMC's arguments that the trial court allowed MRIA to prejudice the jury.

demonstrates that SARMC took numerous actions that were extreme deviations from reasonable standards of conduct. The evidence shows that in addition to its wrongful withdrawal, SARMC undertook a course of conduct intended to inflict the greatest harm possible on MRIA. Indeed, it is axiomatic that it was an extreme deviation from reasonable standards of conduct among partners for a partner like SARMC to breach its contractual and fiduciary duties by competing with its fellow partners and seeking to run those fellow partners out of business for the purpose of reaping higher profits for itself. That, however, is exactly what SARMC did in the instant case.

Furthermore, it must be noted that SARMC objected to MRIA's expert, Professor Branson, on the grounds that whether SARMC's conduct was an extreme deviation from reasonable standards of care was not a proper subject for expert testimony. (R., Ex. 73 at 9.) The trial court agreed and excluded Professor Branson's testimony. (R. Vol. VII at 1317-1323.) Nevertheless, the trial court had that testimony when it ruled on MRIA's motion. (R., Ex. 48.)

Professor Branson, after reviewing the evidence of SARMC's shocking conduct, concluded that SARMC's misconduct constituted an extreme deviation from normal standards of conduct followed by partners, and that the actions of SARMC were taken with a professional disregard for their consequences to MRIA. (*Id.* at ¶¶ 17-28.) Specifically Professor Branson opined that:

- SARMC knowingly engaged in conduct that was an extreme deviation from the standards of conduct partners owe in a partnership in that it repeatedly served the best interests of competitors (IMI, ICR, and SARG/GSR) rather than the best interests of the MRIA Partnership, of which it was a partner.

- SARMC engaged in a further extreme departure from the applicable partnership standard of conduct by its wrongful dissociation, without any colorable grounds therefor, and despite warnings from authoritative sources (PricewaterhouseCoopers, Shattuck Hammond Partners) that such a dissociation would be wrongful.

- SARMC further departed from the applicable partnership standard of conduct by efforts to dissociate from the partnership in bad faith, apparently attempting to inflict harm on the MRIA partnership and the other partners therein by, *inter alia,* wrongfully demanding immediate payment for its partnership interest; preparing a portable MRI unit pad in the SARMC parking lot; threatening to restrict MRICI's access to the SARMC DR server and PACS systems, which required MRICI to build its own PACS/RIS system; condoning or facilitating the curtailment of services and availability of SARG/GSR radiologists at MRICI; simultaneously condoning or facilitating the expansion of services and availability of SARG/GSR physicians at the competing IMI facilities; and in general pursuing what it termed a "scorched earth" approach to its attempted dissociation.

- In addition to having departed from the standards of conduct which govern partners in a partnership, SARMC violated the express provisions of the MRIA Partnership Agreement by its attempted withdrawal from the MRIA Partnership without any colorable grounds, or any grounds at all, therefor.

- SARMC violated the express provisions of the MRIA Partnership Agreement by competing, alone and through its affiliate, IMI, with the MRIA Partnership, in violation of the express covenant not to compete contained in the MRIA Partnership Agreement.

- SARMC usurped a partnership opportunity, and aided and abetted the usurpation of a partnership opportunity by another, in providing information technology, telecommunications, records storage and retrieval, human resources, experienced personnel and other services, without distinction between MRI and non-MRI lines of business, to the IMI 9th and Myrtle diagnostic imaging facility in Boise, Idaho.

- Similarly, SARMC usurped a second partnership opportunity, and aided and abetted the usurpation of a partnership opportunity by another, in providing information technology, telecommunications, records storage and retrieval,

> human resources, experienced personnel and other services, without distinction between MRI and non-MRI lines of business to the diagnostic imaging facility in Meridian, Idaho.

(*Id.* at ¶¶ 17-23.) Professor Branson further found that SARMC engaged in a "radical and extreme departure from the standards applicable to dealings between or among partners when it made affirmative misrepresentations, told half-truths, or dissembled, to its fellow partners, either in response to inquiries from its partners, or on its own volition." (*Id.* at ¶ 27.) Professor Branson then testified to the following as examples of such misrepresentations:

- SARMC [represented it] would not support MRI operations at IMI LLC when in fact it did, over a period of several years.
- SARMC [represented it] had no plans for participation in any Meridian, Idaho diagnostic imaging facility, when it in fact did have plans.
- SARMC not only failed to disclose but actively concealed its commitment to pursue a Meridian, Idaho facility in connection with IMI.
- Dissembled regarding the undisclosed service by key SARMC employees on the boards of managers, or of partners, respectively, of the competing entitles, IMI and MRIA, in the latter of which SARMC was a partner.
- Failed to disclose to its partners the provision of confidential MRIA financial information to potential third party investors or putative lenders to SARMC.
- Misrepresented the affiliate status of IMI once SARMC had become a signatory to the IMI Operating Agreement, with 3 of 6 SARMC managers on the MI Board of Managers.
- Did not accurately disclose the extent of its $2.1 million investment and the use (commingling) of the investment in support of IMI's MRI as well as its non-MRI lines of business.

(*Id.*) This testimony supports the strong evidence that MRIA presented which demonstrated that

SARMC's conduct constituted an extreme deviation from reasonable standards of care.

6. SARMC's Conduct was at Least as Egregious as Conduct Found by this Court to be Sufficient to Support a Claim for Punitive Damages.

Despite SARMC's protestation that its conduct was nothing more than a breach of contract, the totality of the evidence demonstrates that its conduct was much more egregious. Indeed, the conduct was at least as egregious as conduct found by this Court to be sufficient to support a claim for punitive damages. For example, in *Rockefeller v. Grabow*, this Court sustained an award of punitive damages in a commercial dispute where a realtor was "working actively against [his clients'] interests" and favored one client to the detriment of another "thereby violating his fiduciary duty to the Grabows." 136 Idaho 637, 647, 39 P.3d 577, 587 (2001). Here, SARMC's conduct was more egregious in that SARMC not only favored IMI over its partners in MRIA, it actively conspired to compete against, and ultimately destroy, MRIA while still a partner in MRIA.

In *General Auto Parts Co., Inc. v. Genuine Parts Co.*,132 Idaho 849, 854, 979 P.2d 1207, 1212 (1999), this Court discussed with approval two Court of Appeals cases affirming punitive damage awards under less egregious facts. The first case, *Cuddy Mountain Concrete Inc. v. Citadel Constr., Inc.*, 121 Idaho 220 824 P.2d 151 (Idaho Ct. App. 1992) involved a breach of contract claim between a general contractor (Citadel) and a subcontractor (Cuddy Mountain). Citadel terminated the contract without giving Cuddy Mountain the required seven-day written notice. The Court of Appeals "determined that the following behavior by Citadel constituted oppressive conduct sufficient to support an award of punitive damages: (1) the evidence showed

that Citadel's decision to terminate 'was conceived in frustration and consummated in anger' and there was no evidence that Citadel gave any thought to the consequences of its decision; (2) the termination in fact caused financial hardship to Cuddy Mountain; (3) Citadel refused to pay the balance Cuddy Mountain demanded for the work it had performed; and (4) following termination, Citadel altered certain daily reports which had been prepared prior to the termination." *General Auto Parts*,132 Idaho at 854, 979 P.2d at 1212 (citing *Cuddy Mountain*, 121 Idaho at 227-28, 824 P.2d at 158-59.) Here, SARMC's actions were more egregious than Citadel's. Whereas Citadel's actions were consummated in anger, SARMC's actions were cool, deliberate and premeditated. Whereas Citadel's actions were taken without regard to the consequences, SARMC conducted itself with full knowledge of, but with intentional and willful disregard for, the consequences of its actions, taking a "scorched earth" approach.

The second case the Court discussed with approval is *Davis v. Gage,* 106 Idaho 735, 682 P.2d 1282 (Ct.App.1984). In *Davis*, the Gages sold real property to the Davises so that Davises could build a restaurant/tavern. *Id.* at 737-38, 682 P.2d at 1284-85. As part of the sale, the Gages agreed not to open a competing business on nearby property owned by the Gages. *Id.* The Gages, in violation of the noncompete agreement, opened a competing business and tore down the Davises' billboard advertising their restaurant. *Id.* At trial, the Davises were awarded nominal damages and punitive damages. The Gage's appealed arguing, among other things, that punitive damages may not be awarded in a breach of contract case. *Id.* at 739; 682 P.2d at 1286. The Court of Appeals rejected the argument holding that:

> The district court stated that it could "imagine no clearer case of a violation of the intent expressed by the noncompetition clause in the original agreement." Nor can we. The covenant not to compete was clear and unambiguous. The Gages' conduct was, according to the district court, "willful, wanton, malicious and the proper subject for punitive damages."

Id. Likewise, in the instant case, the covenant not to compete was clear and unambiguous and SARMC's conduct was willful and deliberate. However, the relationship between SARMC and MRIA was far closer than the relationship between the Gage's and the Davises. When compared to the Gages conduct against a purchaser, SARMC's conduct was more egregious as it was aimed at the partners to whom SARMC owed a duty of trust and fidelity. Despite such duty, SARMC took conscious acts aimed at promoting, establishing and operating a competing business in violation of the partnership's non-compete agreement and aimed at destroying MRIA or otherwise hindering MRIA's ability to compete.

Thus, SARMC's conduct clearly justifies submitting the issue of punitive damages to the jury as that conduct was at least as, if not more, egregious than conduct found by this Court to be sufficient to support a claim for punitive damages. SARMC deliberately and with conscious disregard for the consequences of its actions, competed with its partners in MRIA and took other actions which caused the destruction of MRIA's business.

7. The Court Did Not Exercise Reasoned Judgment When It Refused to Submit the Issue of Punitive Damages to the Jury.

Because there was substantial evidence that SARMC willfully and deliberately violated its contractual and fiduciary duties with conscious disregard for the legal right of MRIA, the trial court did not exercise reasoned judgment when it refused to submit the issue of punitive damages

to the jury. *Student Loan Fund of Idaho Inc. v. Duerner,* 131 Idaho 45, 52, 951 P.2d 1272, 1279 (1998). Additionally, the trial court's contradictory statements concerning the evidence demonstrate that the trial court failed to exercise reason when it refused to submit the issue. It is true that when MRIA renewed its motion at the close of the evidence, the trial court denied the motion stating that MRIA did not prove the necessary conduct with clear and convincing evidence. (TR Vol. III at 4261:18-4262:2.) That decision, however, is directly contradicted by the trial court's comment on the evidence at the hearing on SARMC's motion for a new trial.

> But this court listened to overwhelming evidence that the executive management team at Saint Alphonsus really blatantly ignored the partnership rights of a partner. I think the evidence that came in was clear and convincing. I think that's just what was out there through the discovery process over many years. It was demonstrated to this jury that Saint Alphonsus chose to compete directly/indirectly with a partner. And the jury so found.

(*Id.* at 4471:9-17 (emphasis added).) This finding that MRIA proved with "clear and convincing" evidence that SARMC "blatantly ignored the partnership rights of partner" by competing with MRIA supports an award of punitive damages. Furthermore, this finding, which came after further reflection upon the evidence by the trial court, is consistent with the substantial evidence produced at trial as illustrated above and proves that the trial court failed to exercise reasoned judgment when it refused to submit the issue of punitive damages to the jury. Consequently, the trial court's refusal to submit the issue to the jury should be reversed in the event the Court grants SARMC a new trial.

B. The Trial Court Erred in Dismissing MRIA's Antitrust Claims.

The trial court erred when it granted summary judgment in favor of SARMC dismissing

MRIA's antitrust counterclaims. (*See* R. Vol. V, at 905-946; R. Vol. XI at 2077-81). As previously discussed in MRIA's opening brief, the trial court wrongly held that MRIA lacked standing because it had not suffered an "antitrust injury." This Court should also reject SARMC's alternative theories that SARMC's actions increased competition, or that a jury would be unable to conclude that SARMC had the ability to achieve monopoly power.

1. Standard of Review.

On appeal from the grant of a motion for summary judgment, the Court employs the same standard used by the district judge originally ruling on the motion. *Intermountain Eye and Laser Centers, P.L.L.C. v. Miller*, 142 Idaho 218, 222, 127 P.3d 121, 125 (2005). Summary judgment is proper only where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Fenn v. Noah*, 142 Idaho 775, 778, 133 P.3d 1240, 1243 (2006); I.R.C.P. 56(c). The facts must be liberally construed and all inferences will be drawn in favor of the non-moving party. *Fenn,* 142 Idaho at 778, 133 P.3d at 1243. The Court reviews the record before the district court, including the pleadings, depositions, admissions and affidavits, if any, to determine *de novo* whether, after construing the facts in the light most favorable to the nonmoving party, there exists any genuine issues of material fact. *Woodland Furniture, LLC v. Larsen*, 142 Idaho 140, 143, 124 P.3d 1016, 1019 (2005).

2. Under Idaho Law, MRIA Did Not Need to Show Harm to Competition as a Whole or Monopoly Power to Assert Its Antitrust Claims.

As noted in MRIA's opening brief, Idaho law, as set forth in *Twin Falls Farm & City Distributing, Inc. v. D & B Supply Co*, 96 Idaho 351, 528 P.2d 1286 (1974), does not require a

showing of "market injury" and "market power" to sustain an antitrust claim. In, *Twin Falls*, the Court ultimately held that a fiduciary's breach of loyalty, combined with a third-party's knowledge of and assistance in that breach, constituted anticompetitive conduct in violation of Idaho's antitrust laws. The Court did not require a showing of market injury or market power.

The facts of *Twin Falls* are similar to the facts of the instant case. In *Twin Falls*, the manager of the plaintiff's retail store pursued an opportunity to join the defendant's competing store. *Id.* at 353, 528 P.2d at 1288. During this time, the defendant knew that the manager worked for the plaintiff's store. *Id.* The manager assisted the defendant with a lease opportunity, knowing this would give the defendant a competitive advantage over the plaintiff. *Id.* The manager was hired to manage the defendant's store, and they worked together to take over the plaintiff's prime location. *Id.* As a result, the plaintiff lost its location, a portion of its customer base, and some of its employees. *Id.* at 353-354, 528 P.2d at 1288-1289. Overturning the district court's summary judgment in favor of the defendant, the Idaho Supreme Court determined that the manager breached his fiduciary duty to the plaintiff and that this breach, with the defendant's knowledge and assistance, amounted to anticompetitive conduct in violation of Idaho's antitrust laws. *Id.* at 356-360, 528 P.2d at 1291-1295.

As with the manager and defendant in *Twin Falls*, SARMC's conduct also constitutes a violation of Idaho's antitrust laws. Like the manager in *Twin Falls*, SARMC breached its fiduciary duties. (R. Vol. XII at 2296.) Like the manager and defendant in *Twin Falls,* SARMC and IMI worked together to create a competing entity while disparaging MRIA, (R. Conf. Ex. 1 at 7, Exhibit PP thereto), and providing advantages to the competing entity, IMI. (R. Conf. Ex. 1

at 3, Exhibit H and at 7, Exhibit OO thereto.) Consistent with the rationale outlined in *Twin Falls*, this conduct not only constitutes a breach of loyalty/fiduciary duty on SARMC's part, but also constitutes a violation of antitrust laws by both SARMC and IMI.

In *Twin Falls* this Court did not require the plaintiff to show evidence of a market-wide injury, as required by the district court in the instant case. Instead, this Court found it sufficient that the plaintiff was injured by the conspiracy to drive the plaintiff out of business. *Twin Falls.* at 359, 528 P.2d at 1294. Here, there was ample evidence presented to the trial court that SARMC and IMI conspired to drive MRIA out of business. Such evidence is sufficient to sustain an antitrust claim under this Court's decision in *Twin Falls*.

Notably, SARMC did not even address *Twin Falls* in its brief. Instead, SARMC focused on federal cases and the requirements of federal law. SARMC apparently hopes that this Court will ignore its prior holding in *Twin Falls*. The decision in *Twin Falls*, however, cannot be ignored because it remains controlling law in Idaho and because MRIA's claim was made under Idaho, not federal, law. (R., Vol. V at 905-946.) Therefore, because MRIA's antitrust claims were sufficient under *Twin Falls,* the trial court erred when it granted summary judgment against MRIA on those claims.

3. Even if MRIA Was Required to Show Harm to Competition as Whole, MRIA Satisfied that Requirement.

Even if the requirements of federal case law are applicable, MRIA has satisfied those requirements. According to federal case law, a private plaintiff has standing to bring an antitrust action if, among other things, it asserts an antitrust injury. *Balaklaw v. Lovell*, 14 F.3d 793,

797 (2nd Cir. 1994). The purpose of antitrust laws is to protect the public by keeping the channels of competition free. *Pennsylvania Water & Power Co. v. Fed. Power Com'n.*, 193 F.2d 230 (D.C. Cir. 1952). Therefore, it has been said that a plaintiff shows an "antitrust injury" when it shows harm to competition as a whole. *See New York Medscan LLC v. New York Univ. Sch. of Med.*, 430 F. Supp. 2d 140, 146 (S.D.N.Y. 2006). A plaintiff shows such harm to competition by alleging adverse effects on the price, quality, or output of the relevant good or service. *See id.* Contrary to the district court's holding and SARMC's argument, MRIA presented ample evidence establishing such adverse effects on the local MRI services market.

MRIA alleged facts showing broadly that SARMC's tactics had market-wide effects beyond merely impacting MRIA's own profits. *Compare with Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 97 S.Ct. 690 (1977). These tactics, which are more fully delineated in MRIA's opening brief (Respondent's Brief at 72-74, n. 47), include making misleading reports to the referring physician community, providing lower levels of service to MRIA patients, receiving higher prices for comparable goods and services, and directing patients away from MRIA's facilities. MRIA outlined a number of ways that SARMC's tactics caused an antitrust injury, including reducing patient care (R. Vol. V at 905-46 at ¶¶ 40, 68, 127); increasing price (*id.* at ¶¶ 66, 127), and decreasing the output of medical imaging (*id.* at ¶ 72). MRIA also submitted an affidavit and report from its economic expert, Edward Whitelaw, stating a number of ways in which SARMC's actions increased price and harmed competition in

the market.[7] (R., Ex. 144). Whitelaw opined in a similar manner in his deposition. (R., Ex. 104 at Ex. D, p. 50:14-23; *see also* R., Ex.110 at Ex. A, p. 2-14; R., Ex. 143 at 2, Ex. A thereto at 12).[8] Construing these facts in favor of MRIA, as the Court must, this evidence is more than sufficient to raise a genuine issue of material fact that an antitrust injury had occurred. Contrary to SARMC's arguments, these facts reflect an injury to the competitive market, not merely to MRIA as a competitor in the market.

SARMC nevertheless argues that the Court should affirm the summary judgment because its activities increased competition by causing IMI to join the market. (Cross-Respondent's Brief at 45-47). The facts and evidence submitted to the trial court establishes that the opposite actually occurred. As discussed above, MRIA demonstrated that SARMC's activities damaged, rather than increased, competition in the market. Moreover, SARMC's conduct was "without

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[7] To the extent that the district court reasoned that Whitelaw's report did not sufficiently show a "market wide injury," the court itself hampered MRIA's ability to prove market-wide injury when it ruled that MRI providers in the relevant market would not be required to produce any records of MRI scans. (R. Vol. III at 557-60). That decision prevented MRIA from presenting relevant evidence concerning harm in the market. (*See* R., Ex. 110, Exhibit A at 2-3). The trial court cannot complain about lack of evidence when a decision of the trial court prevented MRIA from obtaining that evidence. *See Vaught v. Dairyland Ins. Co.*, 131 Idaho 357, 363, 956 P.2d 674, 680 (1998) (recognizing that it may be an abuse discretion to deny the discovery of critical information unavailable from another source).

[8] The fact that SARMC's expert disputed Whitelaw's opinion does not support the trial court's decision to grant summary judgment because summary judgment is inappropriate when reasonable minds come to different conclusions. *Carl H. Christensen Family Trust v. Christensen,* 133 Idaho 866, 870, 993 P.2d 1197, 1201 (1999) ("If reasonable minds might come to different conclusions, summary judgment is inappropriate."); *Watts v. Lynn*, 125 Idaho 341, 346 870 P.2d 1300, 1305 (1994) (recognizing prior decisions holding that summary judgment is inappropriate where conflicting testimony from experts is presented).

legitimate business purpose" for it was only to eliminate competition, and not to increase competition. *Gen. Indus. Corp. v. Hartz Mountain Corp.*, 810 F.2d 795, 804 (8th Cir. 1987). As the Supreme Court has said, "[i]f a firm has been 'attempting to exclude rivals on some basis other than efficiency,' it is fair to characterize its behavior as predatory." *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.* 472 U.S. 585, 605, 105 S.Ct. 2847, 2859 (1985) (citation omitted).

Gen. Indus. Corp., 810 F.2d 795, is illustrative. In that case, the plaintiff had been a non-exclusive distributor of the defendant's products for a number of years. *Id.* at 798. In order to meet a request made by one of the plaintiff's retail customers, the plaintiff began to distribute competing products as well. *Id.* at 798-99. These products were of comparable quality for a lower price. *Id.* at 798. As a result, the defendant began enforcing a contract provision limiting credit to the plaintiff, despite years of waiving the provision. *Id.* at 798-99. The defendant also began supplying orders that were short-shipped or otherwise inaccurate, causing friction between the plaintiff and its retail customers. *Id.* at 799. Ultimately, the defendant terminated the contract and began heavily advertising on behalf of the plaintiff's closest competitor. *Id.* The Court held that these actions were not reasonably gauged to promote competition based upon the quality of the products or the efficiency of the companies, but instead that the defendant "invoked its considerable market power to cause superior competing products to fail to reach retail shelves, preempting any opportunity for the consumer to make a real choice." *Id.* at 804.

That is precisely what happened in this case. SARMC's tactics, including making misleading reports to the referring physician community, (R. Conf. Ex. 1 at 7, Exhibit PP

thereto), providing lower levels of service to MRI Center patients, (R. Conf. Ex. 1 at 7, Exhibit OO thereto), directing patients away from MRIA's facilities, (R. Conf. Ex. 1 at 7, Exhibit LL and Ex. 143 at 2, Exhibit B thereto), and preventing SARMC affiliated doctors from having the ability to digitally review MRIA reports while allowing such doctors access to IMI reports (Tr. Vol. II, 2437:10- 2439:17); were designed to prevent MRIA's comparable lower-priced services from reaching the public and preempting any opportunity for the consumer to make a real choice.[9] The facts and evidence establish that SARMC's conduct with respect to IMI was predatory and not for a legitimate business purpose to increase competition, as SARMC would have this Court believe.

4. MRIA Has Not Conceded Its Antitrust Argument.

To the extent that SARMC argues that MRIA is precluded from making an antitrust argument because it "concedes" that competition was the actionable conduct (Cross-Respondent's Brief at 46-47), the argument is erroneous and misplaced. SARMC cites to a footnote in MRIA's opening brief where MRIA discussed SARMC's irrelevant citations to antitrust cases in a discussion of MRIA damages for SARMC's breaches of contract and fiduciary duties. (Respondent's Brief at 45 n. 30). SARMC also notes a portion of MRIA's brief where MRIA discussed SARMC's promotion of certain technology for IMI which placed IMI in

[9] Because MRIA showed damage to the competitive market, SARMC's argument that its behavior merely constitutes a "business tort" and not anticompetitive conduct is inapposite. (Cross-Respondent's Response, at 46-47). *See Conwood Co., L.P. v. U.S. Tobacco Co.* 290 F.3d 768, 783 -784 (6th Cir. 2002) (noting that business torts do not constitute anticompetitive conduct absent a "significant and more than a temporary effect on competition").

a better competitive position. (Respondent's Brief at 9). SARMC takes these comments out of context.

In its opening brief, SARMC argued that there had been no showing that its breaches of fiduciary duty, breaches of the non-compete agreement, tortious interference and bad faith caused "lost scan" damage to MRIA. (Appellant's Brief at 31-36). Citing to antitrust cases, SARMC suggested that MRIA was required to prove "what proportion of the scans that migrated from MRIA to IMI did so as a result of Saint Alphonsus's alleged misconduct, as opposed to other causes, such as IMI's entry into the competitive marketplace." *Id.* at 31. MRIA countered this argument by stating that (1) IMI and SARMC were one in the same, (2) SARMC was a partner in IMI, (3) IMI entered the market with SARMC's assistance, and that (4) SARMC and GSR conspired to shift scans from MRIA to IMI. (Respondent Brief at 41-47.)

In the specific portions of its Respondent's Brief noted above, MRIA further argued that SARMC was inappropriately conflating antitrust arguments with breach of fiduciary duty/breach of contract arguments. MRIA explained that in the latter cases, to prove causation a plaintiff need only show the defendant competed in violation of some agreement or duty and acquired customers that were historically customers of the plaintiff. *Vancil v. Anderson*, 71 Idaho 95, 105, 227 P.2d 74, 79 (1951) (holding that to prove causation in a non-compete case, the evidence must show that "plaintiff business suffered a loss of profits by reason of its patrons and customers trading with defendant"). MRIA contrasted this with antitrust cases, where the plaintiff must show that the damages came from an antitrust injury rather than competition by itself. *Pope*, 103 Idaho at 233-34, 646 P.2d at 1004-05 (1982); *Cargill, Inc. v. Monfort of*

Colorado, Inc., 479 U.S. 104, 116, 107 S.Ct. 484, 492 (1986). MRIA's comments in its brief that "competition was the actionable conduct" (Respondent's Brief at 45, n. 30) and that SARMC had given IMI a competitive edge (*Id.* at 9), merely clarified, contrary to SARMC's assertions otherwise, that competition is the appropriate source of the damages in breach of fiduciary duty/breach of contract cases.

Those arguments are not incompatible with MRIA's antitrust claims. SARMC did not enhance competition by assisting IMI's entry into the market. Instead, SARMC destroyed competition. As demonstrated in Part I.A.4.b.i through Part I.A.4.b.ix above, SARMC used its considerable market power (i.e., its relationship with referring physicians) to destroy MRIA's business in favor of IMI. SARMC acted "without legitimate business purpose" to eliminate competition and it did so through predatory behavior. *Gen. Indus. Corp.*, 810 F.2d at 804; *Aspen Skiing Co.*, 472 U.S. at 605, 105 S.Ct. at 2859. Thus, whereas it was SARMC's competition with MRIA that caused MRIA damages for purposes of MRIA's non-antitrust claims, it was the way that competition was conducted that gives rise to MRIA's antitrust claim and injury. The claims are not incompatible.

5. Even if MRIA Was Required to Present Evidence of Market Power to Sustain its Antitrust Claims, MRIA Satisfied that Requirement.

Although not required for MRIA to proceed on its Idaho law based antitrust claims, MRIA presented ample evidence that SARMC/IMI had the ability to achieve monopoly power in the provision of MRI services. To succeed on an attempted monopolization claim, a plaintiff must show that there is a dangerous probability that the defendant will achieve "monopoly

power." *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 456, 113 S.Ct. 884, 891 (1993); *Cascade Health Solutions v. PeaceHealth*, 515 F.3d 883, 893 (9th Cir. 2008); *Pope v. Intermountain Gas Co.*, 103 Idaho 217, 229, 646 P.2d 988, 1000 (1982). "Monopoly power is the 'power to control prices or exclude competition' in the relevant market." *Image Technical Services, Inc. v. Eastman Kodak Co.*, 125 F.3d 1195, 1202 (9th Cir. 1997) (citing *United States v. E.I. DuPont DeNemours & Co.*, 351 U.S. 377, 391, 76 S.Ct. 994, 1005 (1956)).

To determine whether a defendant is dangerously close to obtaining monopoly power, "it is necessary for the court to measure and evaluate the degree of market power which the defendant possesses." *Pope*, 103 Idaho at 229, 646 P.2d at 1000. In determining whether there is a dangerous probability of monopolization, courts "consider the relevant market and the defendant's ability to lessen or destroy competition in that market." *Spectrum Sports*, 506 U.S. at 456, 113 S.Ct. at 891. "[D]emonstrating the dangerous probability of monopolization in an attempt case . . . requires inquiry into the relevant product and geographic market and the defendant's economic power in that market." *Id.* Monopoly power is often referred to as "market power," and can be proven by either direct or circumstantial evidence. *Image Technical Services*, 125 F.3d at 1202.

MRIA presented evidence of market power through the affidavit, report, and deposition testimony of its economics expert, Mr. Whitelaw. Specifically, MRIA showed that as IMI's market share was increasing, its prices rose above the market for the same services. (R., Ex. 144 at ¶ 2-4; R., Ex. 110 at Ex. A, p. 2; R., Ex. 104 at Ex. D, p. 50:1-23). In his affidavit Mr. Whitelaw presented evidence that:

- "IMI increased its market share while receiving higher payments for patient seeking similar services of comparable quality." (R., Ex. 144 at ¶ 2).

- "My analysis revealed that IMI's market share steadily increased over time and will likely continue to increase. (*Id.* at ¶ 3).

- "I concluded that during 2001-2006, IMI received higher payments for providing services of comparable quality to similar patients relative to those received by other sellers. Higher payments coupled with increasing market share indicated that IMI possesses and has exercised market power in the relevant market." (*Id.* at ¶ 4).

In his report, Mr. Whitelaw made the following germane statements:

- "Based on our analysis . . . the market share of the IMI-SADC imaging partnership increased from approximately 21-23 percent in 2001 to approximately 44-53 percent in 2006. Based on these results I conclude that the partnership has a dangerous probability of achieving a monopoly share of the relevant market, if they have not already done so. (R., Ex. 110 at Exhibit A, p. 2; *see also id.* at 7-12 for supporting data).

- "I conclude that the IMI-SADC imaging partnership has harmed competition in the relevant market by receiving higher-than-market rates from taking MRI scans relative to what these rates would have been in the absence of such anticompetitive behavior. (*Id.* at 2; *see also id.* at 13-14 for supporting data)

Mr. Whitelaw also made these points in his deposition. (R., Ex. 104 at Ex. D, p. 50:1-23.)[10]

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[10] SARMC attacks the strength and reliability of Mr. Whitelaw's analysis and conclusions. (Cross-Respondent's Brief, p. 52-53). This is an inappropriate argument in the review of a summary judgment decision, where the facts must be liberally construed and all inferences will be drawn in favor of MRIA, the non-moving party. *Fenn,* 142 Idaho at 778, 133 P.3d at 1243.

Furthermore, SARMC's contentions are incorrect. SARMC argues that Mr. Whitelaw's report does not take into account the actual prices charged to consumers. On the contrary, Mr. Whitelaw's report indicates that he "calculat[ed] the statistical relationship between the amounts paid by [an insurance provider] for MRI scans provided by IMI and all other providers." (R., Ex. 104 at Ex. G, p. 13). SARMC also argues that Mr. Whitelaw's report inappropriately excluded data from another market participant, St. Luke's. On the contrary, Mr. Whitelaw's report

a. Exclusive Output Is Not the Exclusive Form of Direct Evidence to Prove Market Power.

The combination of the trends of increasing market share and higher prices is direct evidence that SARMC could and did control prices in the market. SARMC nevertheless argues that MRIA was required to present evidence of "restricted output" to show direct evidence of market power. Restricted output refers to circumstances where, by restricting its own output, a predator in the market restricts market-wide output and thereby increases market prices. *Rebel Oil Co., Inc. v. Atlantic Richfield Co.*, 51 F.3d 1421, 1434 (9th Cir. 1995). SARMC relies on Ninth Circuit cases which state that direct proof of market power "may be shown by evidence of restricted output and supracompetitive prices." *Forsyth v. Humana, Inc.*, 114 F.3d 1467, 1475 (9th Cir. 1997) (emphasis added).[11] *See Rebel Oil Co., Inc. v. Atlantic Richfield Co.*, 51 F.3d 1421, 1434 (9th Cir. 1995).

"The defining characteristic of direct evidence is that it demonstrates actual injury to competition." *In re Abbott Laboratories Norvir Anti-Trust Litigation*, 562 F.Supp.2d 1080, 1086 (N.D.Cal. 2008). As such, it is absurd to read the Ninth Circuit cases cited above as dictating the only type of acceptable direct evidence of the injurious exercise of market power to

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indicates that he made his calculation both with St. Luke's data inserted and without, and that both sets of data indicate that IMI received higher payments. *Id.* (Indeed, removing the St. Luke's data is to IMI's benefit, because it suggests that overpayment to IMI was not as egregious).

[11] In *Forsyth*, the Ninth Circuit stated that a mere increase in price is not sufficient to show that a defendant has market power. *Forsyth*, 114 F.3d at 1476. Unlike *Forsyth*, however, MRIA has shown more than an increase in price. It has shown both IMI's increasing market share and a contemporaneous increase in price as that market share has grown.

be restricted output. *Id.* As the United States Supreme Court has said, "'proof of actual detrimental effects, such as a reduction of output,' can obviate the need for an inquiry into market power, which is but a 'surrogate for detrimental effects.'" *F.T.C. v. Indiana Federation of Dentists*, 476 U.S. 447, 460-461, 106 S.Ct. 2009, 2019 (1986) (citing 7 P. Areeda, Antitrust Law ¶ 1511, p. 429 (1986) (emphasis added).)

This illustrative example by the Supreme Court does not limit the kinds of direct proof that might exist. While high prices in conjunction with reduced output are one way of showing market power, it is not the exclusive means of proving actual detrimental effects in the market. Contrary to SARMC's argument, an increase in prices above the competitive level, as presented by MRIA, may establish that monopoly power exists. *See U.S. v. Microsoft Corp.*, 253 F.3d 34, 51 (D.C. Cir. 2001) (when evidence shows that firm has in fact profitably raised prices above competitive level, monopoly power exists); *American Council of Certified Podiatric Physicians and Surgeons v. American Bd. of Podiatric Surgery, Inc.*, 185 F.3d 606, 623 (6th Cir. 1999) ("The price difference, coupled with the larger market share, supports plaintiff's claim of monopoly power by [the defendant]." (Emphasis added)); *Natsource LLC v. GFI Group, Inc.*, 332 F. Supp. 2d 626, 635 (S.D.N.Y. 2004) ("Market share is just a way of estimating market power, which is the ultimate consideration. When there are better ways to estimate market power, the court should use them. These ways include a contemporaneous rise in price with increased market share." (Internal citations omitted and emphasis added).)

As noted above, "[m]onopoly power is the 'power to control prices or exclude competition' in the relevant market." *Image Technical Services, Inc. v. Eastman Kodak Co.*, 125

F.3d 1195, 1202 (9th Cir. 1997). The proof presented by MRIA of a contemporaneous rise in price with increased market share is direct and perfectly appropriate evidence that SARMC and IMI actually exercised monopoly power.

b. Circumstantial Evidence Is Also Appropriate to Establish Monopoly Power.

The Court could alternatively hold that Mr. Whitelaw's affidavit, report, and deposition testimony showing increasing market share and increasing price provides circumstantial evidence of monopoly power. To demonstrate market power by circumstantial evidence, a plaintiff must: "(1) define the relevant market,[12] (2) show that the defendant owns a dominant share of that market, and (3) show that there are significant barriers to entry and show that existing competitors lack the capacity to increase their output in the short run." *Image Technical Services, Inc. v. Eastman Kodak Co.* 125 F.3d 1195, 1202 (9th Cir. 1997) (citing *Rebel Oil,* 51 F.3d at 1434.

"A rising [market] share may show more probability of success of achieving [a monopoly] than a falling share." *M & M Medical Supplies and Service, Inc. v. Pleasant Valley Hosp., Inc.*, 981 F.2d 160, 168 (4th Cir. 1992). As the Idaho Supreme Court has said, there is "no set degree or percentage of market power which must be possessed in order for a defendant to be dangerously close to achieving a monopoly." *Pope*, 103 Idaho at 229, 646 P.2d at 1000.

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[12] A description of the relevant market is contained in Mr. Whitelaw's report. (R., Ex. 110 at Ex. A at 3-6.) The parties previously used this is the definition of the market (*see* R. Vol. IX at 1619), and there is no disagreement on this point on appeal.

See Rebel Oil, 51 F.3d at 1438, n. 10 (declining to adopt bright-line market percentage rules). Instead, "the extent of market power must be evaluated in conjunction with prevailing market conditions, as well as the business policies and performance of the defendant." *Pope,* 103 Idaho at 229; s*ee also Theme Promotions, Inc. v. News America Marketing FSI*, 546 F.3d 991, 1002 (9th Cir. 2008) ("We have determined that a 45-70% market share may be enough to establish a substantial share of the relevant market where it is accompanied by other factors."). MRIA showed that IMI had a 40 to 50 percent market share that was steadily increasing, well within the range of the "substantial share of the relevant market" required by Idaho courts.

Notwithstanding this, SARMC argues that this percentage is insufficient to show market power in the absence of evidence showing "barriers to entry." Generally, the ability of new competitors to enter a market is relevant because, if entry is easy, even a firm holding a commanding percentage of the market cannot charge a price above the competitive price, for once it does, competitors will enter the market and undercut the firm's price. *See United States v. Syufy Enters.*, 903 F.2d 659, 667 (9th Cir. 1990). Barriers to entry are significant because they "constrain[] the normal operation of the market to the extent that the problem is unlikely to be self-correcting." *Rebel Oil,* 51 F.3d at 1439.

In this case, rather than analysis of hypothetical barriers to entry, the parties and the court were in a better position to evaluate any barriers to entry in light of the *ex post* description of the relevant market, including IMI's increasing market share and its persistently higher prices for six years. Despite any net entry that may have occurred (and, indeed, according to SARMC, which did occur), this failed to offer enough market discipline to eliminate IMI's combination of

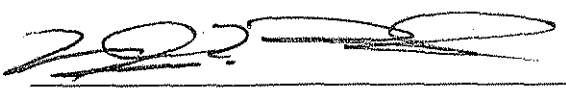
increasing share and higher prices. *Cf. Rebel Oil,* 51 F.3d at 1440-41 ("Barriers may still be 'significant' if the market is unable to correct itself despite the entry of small rivals."). An estimation of what may prospectively happen through a "barriers to entry" analysis is no substitute for examining and analyzing what actually did happen. Here, where MRIA showed that IMI owned an increasing 40 to 50 percent market share and was able to charge higher prices than the rest of the market for comparable services regardless of entries into the market, MRIA has shown market power sufficient to survive summary judgment.

II. CONCLUSION

For the foregoing reasons the trial court's (1) refusal to submit the issue of punitive damages to the jury should be reversed in the event the Court grants SARMC a new trial because MRIA proved, through clear and convincing evidence, conduct sufficient to justify an award of punitive damages and (2) the dismissal of MRIA's antitrust claims should be reversed in the event the Court grants SARMC a new trial because MRIA sufficiently asserted an antitrust claim under both Idaho and federal law.

Dated: January 29, 2009

Respectfully Submitted,



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Wade L. Woodard
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Attorneys for Respondent

CERTIFICATE OF SERVICE

I hereby certify that on the 29th day of January, 2009, two true and correct copies of the foregoing RESPONDENT'S REPLY IN SUPPORT OF CROSS-APPEAL were served upon the following counsel for Appellant in the manner set forth below:

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Jack S. Gjording **(VIA HAND DELIVERY)**
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INDEX TO APPENDIX

EXHIBIT A

EXHIBIT A

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Attorneys for
Defendants/Counterclaimants/Third Party
Plaintiff MRI Associates, LLP

IN THE DISTRICT COURT FOR THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

SAINT ALPHONSUS DIVERSIFIED CARE, INC., an Idaho nonprofit corporation,

Plaintiff,

v.

MRI ASSOCIATES, LLP, an Idaho limited liability partnership,

Defendant.
Case No. CV OC 0408219D

MRI ASSOCIATES, LLP, an Idaho limited liability partnership,

CounterClaimant,

v.

SAINT ALPHONSUS DIVERSIFIED CARE, INC., an Idaho nonprofit corporation;

SAINT ALPHONSUS REGIONAL MEDICAL CENTER,

CounterDefendants.

MRI ASSOCIATES, LLP, an Idaho limited liability partnership,

Third-Party Plaintiff,

vs.

INTERMOUNTAIN MEDICAL IMAGING, LLC, an Idaho limited liability company; GEM STATE RADIOLOGY, LLP, an Idaho limited liability partnership; and IMAGING CENTER RADIOLOGISTS, LLP, an Idaho limited liability partnership,

Third-Party Defendants.

AFFIDAVIT OF PROFESSOR DOUGLAS M. BRANSON

Douglas M. Branson, being first duty sworn, deposes and says:

1. I am the W. Edward Sell Chair in Business Law at the University of Pittsburgh School of Law and have occupied that position since September 1, 1996.

2. Prior to September 1, 1996, I was a Professor of Law at Seattle University, Seattle, Washington. I have also been a visiting professor of law at, *inter alia*, University of Oregon, Cornell University, and Washington University (St. Louis, Mo.). I was the Charles Tweedy Distinguished Visiting Professor in Business Law at the University of Alabama School of Law in 1993 and again in 2003.

3. I reside at 810 St. James Street, Pittsburgh, Pennsylvania 15213, and at 193 Raft Island, Gig Harbor, Washington 98335.

4. I am a member of the bars of Ohio, Illinois, Washington, and Pennsylvania. I

am also admitted to practice before the United States Supreme Court and various federal circuit courts of appeal and district courts.

5. I teach, lecture continuing legal education groups, and consult extensively in the area of business organizations, including unincorporated entities, business planning, corporate finance, mergers and acquisitions, corporate governance, comparative corporate governance, and securities regulation. From time to time, I have also taught the courses in agency and partnership, bankruptcy and accounting for lawyers.

6. I received my Bachelor of Arts *cum laude* (Economics) from the University of Notre Dame in 1965, my Juris Doctor *cum laude* from Northwestern University in 1970, and my Master of Laws from the University of Virginia in 1974, where I ranked first in my class.

7. I am the author of several books and treatises, including DOUGLAS M. BRANSON, CORPORATE GOVERNANCE (Lexis Law Publishing 1993)(with annual supplements); DOUGLAS M. BRANSON, PROBLEMS IN CORPORATE GOVERNANCE (Cathedral Press 1997); DOUGLAS M. BRANSON, UNDERSTANDING CORPORATE LAW (Matthew Bender Co. 1999)(2d ed. 2004)(with A. Pinto); QUESTIONS AND ANSWERS ON BUSINESS ORGANIZATIONS (LexisNexis 2004); DOUGLAS M. BRANSON, INSIDE THE BOARDROOM (2003); and DOUGLAS M. BRANSON, NO SEAT AT THE TABLE (NYU Press 2007).

8. I am the author of approximately sixty law review articles in the areas of

business organizations, governance, mergers and acquisitions, and securities regulation, including articles in Cornell Law Review, Tulane Law Review (2), Vanderbilt Law Review (2), Emory Law Journal, Northwestern University Law Review (2), Minnesota Law Review, Journal of Corporate Law, Nebraska Law Review, Fordham Law Review, Corporate Practice Commentator (3), Maryland Law Review, University of Pittsburgh Law Review, Cornell International Law Journal, Case Western Reserve Law Review, Pepperdine Law Review, University of Cincinnati Law Review, South Carolina Law Review, Southern Methodist Law Review, Wake Forest Law Review, Arizona State Law Journal, Washington University Law Quarterly, Oregon Law Review, Securities Regulation Law Review, and other legal periodicals and journals.

9. In the last 25 years I have lectured continuing legal education and business groups on issues, practices, and customs in business organizations (partnerships, limited liability partnerships, limited partnerships, limited liability companies, corporations, professional service corporations) and governance and in mergers and acquisitions in Hawaii, Alaska, California, Washington, Oregon, Idaho, Ohio, Pennsylvania, Florida, Louisiana, and New York. Overseas, I have lectured groups on governance issues and practices in, *inter alia*, Spain, France, Belgium, Germany, South Africa, the United Kingdom, Australia, Indonesia, Malaysia, and Hong Kong.

10. I hold a permanent appointment as a Senior Fellow at the School of Law, University of Melbourne, Australia, where for the last thirteen years I have co-taught the

graduate law offerings Corporate Governance and the Duties of Directors.

11. From 1976 to 1996, I served on, and actively participated in the affairs of, the Washington State Bar Association (WSBA) Corporate Law Revision Committee. I also served on the WSBA Securities Law Committee (1986-1994), the WSBA Limited Partnership Act Revision Committee (1983-85), the Not-For-Profit Corporation Law Revision Committee (1979-85), and the WSBA Committee to Evaluate the Revised Uniform Partnership Act (1995-96).

12. I am an elected member of the American Law Institute. I was elected to membership in 1981. From 1981 to 1994, I was an active participant in the American Law Institute Corporate Governance Project and a member of the advisory committee which, periodically, consulted with the Project's reporters.

13. From 2000-2002, I was a United States State Department consultant to the Republic of Indonesia on business organizations law, governance, capital markets, and asset securitization reform In 2000, I was a Fulbright Scholar at the University of Gent, Belgium, lecturing on corporate law and corporate governance. In 2003, I was a State Department consultant to Ukraine, assisting on projects regarding partnerships and law firm organization. In 2006, I was the Paul Hastings Distinguished Visiting Professor at the University of Hong Kong, where I lectured, *inter alia*, at the Hong Kong Futures and Exchange Commission and the Asian Development Bank on corporate governance. In 2006, I was a consultant to US Steel Corp., lecturing attorneys and executives from Serbia,

Slovakia, and the United States on U.S. business law.

14. I am being compensated at $400 per hour.

15. In connection with this case, I have reviewed numerous documents, including court papers (Complaint, Answer and Counterclaim, Scheduling Order, Court's Memorandum Opinion Finding, *inter alia*, Wrongful Dissociation); deposition excerpts (Christopher Anton, Sandra Bruce, Jeffery Cliff, Jack Floyd, Kenneth Fry, Leslie Kelly Hall, Cindy Schamp, Jeffrey Seabourn, and Patricia Vandenberg); Agreements and Drafts of Agreements, including term sheets (MRIA Partnership Agreement and First Amendment thereto; SARG/GSR Exclusive Services Agreement with SARMC; Intermountain Medical Imaging LLC Operating Agreement, including several preliminary drafts; various Term Sheets outlining the terms upon which SARMC would invest in IMI; Medical Director Employment Agreement; Information Resources Agreement); minutes of meetings (IMI, MRIA, MRICI, MRIM, SARG/GSR; ICR); consultants reports (Shattuck Hammond Partners Preliminary Report by M. Finnerty and "Presentation of Strategic Options" by Shattuck Hammond Partners); letters from attorney and other independent contractors (Leo Miller, Esq., to Sister Patricia Vandenberg dated March 5, 1985; Carl W. Harder, Esq. to Ms. Sandra Bruce dated January 6, 2000; Patrick Miller, Esq., to Joseph Uberuaga II, Esq., July 13, 2000; memorandum from Patti Harneck to Leslie Kelly Hall dated January 31, 2002, re IMI use of SARMC DR Server; Memorandum from J. Tim Hall, MD, to MRI Center Scheduling Department re "Mission Creep," and miscellaneous

(SARMC 1122 application for Certificate of Need; US Bank documents re proposed IMI loan; Power Point Slide Deck Entitled Intermountain Medical Imaging, A Joint Venture Partnership Between St. Alphonsus Radiology Group and SARMC, dated Nov. 11, 1999; PricewaterhouseCoopers outlines of SARMC Scenarios Nos. 1-5; Restructuring of MRI Associates, Discussion Draft dated Nov. 29, 1999; Health Technology Center, Report on the Future of Medical Imaging II: PACS, August, 2003); SARMC Withdrawal Letter dated February 24, 2004, and Demand for Payment Letter, dated March 30, 2004; SARG/GSR correspondence by Jeffrey Seabourn re termination of GSR services at MRICI and of MRICI access to DR/Web Ambassador network, and the subsequent reinstatement thereof; email from Jeffrey Cliff to Carl Harder, Esq., listing investments SARMC had made in IMI prior to August 10, 1999.

16. In addition, on Thursday, December 7, 2006, I spent approximately 9 hours at the law offices of Greener, Banducci Shoemaker, P.A., Boise, Idaho, reviewing documents, correspondence and deposition excerpts relevant to this case.

17. Based upon my review of the foregoing, in my opinion, SARMC knowingly engaged in conduct that was an extreme deviation from the standards of conduct partners owe in a partnership in that it repeatedly served the best interests of competitors (IMI, ICR, and SARG/GSR) rather than the best interests of the MRIA Partnership, of which it was a partner. As an experienced business law practitioner, I would have advised SARMC that, in every instance, over and above what the partnership agreement expressly provided,

SARMC's duty was to serve the best interests of the MRIA partnership and its fellow participants in the partnership.

18. In my opinion, SARMC engaged in a further extreme departure from the applicable partnership standard of conduct by its wrongful dissociation, without any colorable grounds therefor, and despite warnings from authoritative sources (PricewaterhouseCoopers, Shattuck Hammond Partners) that such a dissociation would be wrongful.

19. In my opinion, SARMC further departed from the applicable partnership standard of conduct by efforts to dissociate from the partnership in bad faith, apparently attempting to inflict harm on the MRIA partnership and the other partners therein by, *inter alia*, wrongfully demanding immediate payment for its partnership interest; preparing a portable MRI unit pad in the SARMC parking lot; threatening to restrict MRICI's access to the SARMC DR server and PACS systems, which required MRICI to build its own PACS/RIS system; condoning or facilitating the curtailment of services and availability of SARG/GSR radiologists at MRICI; simultaneously condoning or facilitating the expansion of services and availability of SARG/GSR physicians at the competing IMI facilities; and in general pursuing what it termed a "scorched earth" approach to its attempted dissociation.

20. In addition to having departed from the standards of conduct which govern partners in a partnership, SARMC violated the express provisions of the MRIA

Partnership Agreement by its attempted withdrawal from the MRIA Partnership without any colorable grounds, or any grounds at all, therefor.

21. SARMC violated the express provisions of the MRIA Partnership Agreement by competing, alone and through its affiliate, IMI, with the MRIA Partnership, in violation of the express covenant not to compete contained in the MRIA Partnership Agreement.

22. SARMC usurped a partnership opportunity, and aided and abetted the usurpation of a partnership opportunity by another, in providing information technology, telecommunications, records storage and retrieval, human resources, experienced personnel and other services, without distinction between MRI and non-MRI lines of business, to the IMI 9th and Myrtle diagnostic imaging facility in Boise, Idaho.

23. Similarly, SARMC usurped a second partnership opportunity, and aided and abetted the usurpation of a partnership opportunity by another, in providing information technology, telecommunications, records storage and retrieval, human resources, experienced personnel and other services, without distinction between MRI and non-MRI lines of business to the diagnostic imaging facility in Meridian, Idaho.

24. In support of the opinions expressed, *supra* paragraphs 17-23, I would note that SARMC committed the following acts prior to the commencement of business by IMI at the downtown Boise imaging center:

- In order to obtain U.S. Bank financing for the IMI facility, represented, or allowed the representation to be made, that SARMC would "partner" with

SARG/GSR physicians in forming and operating a new facility.

- Provided MRIA and MRICI data, in SARMC's possession and control, as to case volume, technical component charges, staffing levels, and operations data for use in formulation of the IMI business plan.
- Linked IMI and its imaging facility to the SARMC intranet and attending physician network.
- Converted to another vendor and commenced utilization of DR Systems so as to become compatible with the IMI computer network.
- Supported the transfer of key MRICI personnel to a putative competitor, IMI, including Karen Noyes, assistant director of Radiology, SARMC, to IMI Executive Director of Operations.
- Reviewed and approved pro forma projections IMI prepared.

25. In support of the opinions expressed, *supra* paragraphs 17-23, I would note that SARMC committed the following acts from the time at which IMI opened its first imaging facility (August 1999) and the time at which SARMC formally entered into the IMI LLC Operating Agreement:

- Failed to investigate complaints of reduced care/hours of service by SARG/GSR physicians to MRI Center operations, as well as to patients referred to the center.
- Insisted that SARG/GSR physicians continue to read MRICI images even

after SARG/GSR physicians had opened a competing venture (IMI) and a caution issued by a local health care attorney, Carl Harder, that adherence to an exclusive services arrangement by competitors of MRIA would result in breaches of fiduciary duty.

- Insistence that SARG/GSR physicians provide exclusive services despite knowledge that physicians had intentionally curtailed hours and levels of service.
- Continued to provide infrastructure support (information technology, including access to $350,000 DR server, telecommunications, transcription, disaster recovery, down time and other services) without distinction between MRI and non MRI lines of IMI business.
- Provided confidential MRIA partners' and partners' relationship information to IMI.
- Opposed further growth of MRI Mobile (MRIM) despite robust growth of that business.

26. In support of the opinions expressed, *supra* paragraphs 17-23, I would note that SARMC committed the following acts between the time at which it executed the IMI LLC Operating Agreement (July 1, 2001) and the time at which it attempted to withdraw from the MRIA Partnership (LLP as of April 2003) by letter dated February 24, 2004, to be effective April 1, 2004:

- Executing an agreement to sell one half of MRIA when SARMC did not own one half, without disclosing to its MRIA partners details of the exchange offer to which it had agreed.
- Condoning or assisting in disparagement, curtailment of physician services, and other activities which would drive down the value of partnership interests in the MRIA Partnership but which SARMC might acquire in the future.
- Contributing $546,347 in equity capital (which would be commingled with other IMI funds) and assuming responsibility for $1.6 million in bank loans without distinction between MRI and non MRI lines of IMI's business.
- Entering into a 50-50 operating agreement with another 50 percent LLC member, which made the LLC an "affiliate," thereby contractually prohibited from the competition in which it was and had for some time been engaged.
- Utilizing SARMC employees who had duties and responsibilities to MRIA as SARMC's representatives on the IMI Board of Managers, which managed all of IMI's activities, without distinction between MRI and non MRI lines of business.
- Forming an IT/PACS committee exclusively of SARMC and IMI representatives, thereby freezing MRIA out of discussions regarding

important PACS developments.

- Permitting or facilitating dual allegiances, and then the transfer of allegiances and loyalties, of key independent contractors from MRIA to IMI.
- Making extortionate demands at the time of withdrawal, insisting on immediate payment despite knowledge that withdrawal was wrongful and that observance of a one year covenant not to compete was independent of payment *vel non*.

27. In addition, a partner engages in a radical and extreme departure from the standards applicable to dealings between or among partners when it makes affirmative misrepresentations, tells half truths, or dissembles, to one or more of its fellow partners, either in response to inquiries from its partners, or on its own volition. In my opinion, in the case at bar, SARMC told a number of untruths and made the following misrepresentations, which constituted independent violations of the standards applicable to partners in a partnership:

A). SARMC would not support MRI operations at IMI LLC when in fact it did, over a period of several years.

B). SARMC had no plans for participation in any Meridian, Idaho diagnostic imaging facility, when it in fact did have plans.

C). SARMC not only failed to disclose but actively concealed its commitment to pursue a Meridian, Idaho facility in connection with IMI.

D). Dissembled regarding the undisclosed service by key SARMC employees on the boards of managers, or of partners, respectively, of the competing entitles, IMI and MRIA, in the latter of which SARMC was a partner.

E). Failed to disclose to its partners the provision of confidential MRIA financial information to potential third party investors or putative lenders to SARMC.

F). Misrepresented the affiliate status of IMI once SARMC had become a signatory to the IMI Operating Agreement, with 3 of 6 SARMC managers on the IMI Board of Managers.

G). Did not accurately disclose the extent of its $2.1 million investment and the use (commingling) of the investment in support of IMI's MRI as well as its non MRI lines of business.

H). Falsely asserted, via a court complaint and otherwise, that SARMC was free of restraints on withdrawal from the MRIA Partnership, when it knew otherwise and had been so informed by authoritative professionals and consultants.

I). Inferred, or told, untruths regarding the coverage of the covenant not to compete contained in the partnership agreement, asserting that the covenant would only be effective if MRIA bought out SARMC within 120 days, when the agreement contained no such provisions and provided otherwise (that is, the covenant applied in any event).

28. Partners owe to all participants in a partnership not only a duty of loyalty but a duty of the "utmost good faith and loyalty" and a "punctilio of an honor the most

sensitive." In my opinion, the acts of SARMC and those who aided and abetted their violations of fiduciary duty, including failures to act, represented an extreme deviation from the standards of conduct partners owe in a partnership and appear to have been conducted in a wilful and deliberate manner.

GIVEN this 15th day of December, 2006.

Douglas M. Branson

County of Allegheny)
)
Commonwealth of Pennsylvania)

Sworn to and subscribed before me on this 15TH day of December, 2006.

Notary Public

COMMONWEALTH OF PENNSYLVANIA
Notarial Seal
Caroline M. Deasy, Notary Public
City Of Pittsburgh, Allegheny County
My Commission Expires Feb. 12, 2010
Member, Pennsylvania Association of Notaries

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 20 day of December, 2006, a true and correct copy of the within and foregoing instrument was served upon:

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Thomas A. Banducci
G. Rey Reinhardt IV
Daniel J. Gordon

EXHIBIT B

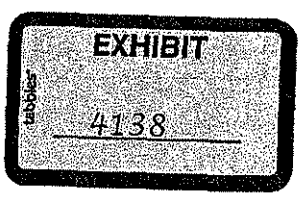
EXHIBIT B

From: <allen.hahn@us.pwcglobal.com>
To: SARMC.PO-SARMC(SARABRAT)
Date: Wed, Jan 5, 2000 2:40 PM
Subject: Engagement Documents

Attached are the documents requested by Cindy and Ken. The report on the IMI joint venture is draft; please have Cindy/Helen review and call w/any comments. We will send a final copy after suggested edits are incorporated. Also is "Scenario 5" which Ken requested based on our reading of the relevant partnership documents. A FEDEX will arrive tomorrow with draft copies of both documents. Please call if either Ken or Cindy would like to discuss.

regards

(See attached file: Report_IMI_9_1_99_final.doc)(See attached file: Scenario 5.doc)



P-1029

SARMC08047
Office of the CFO

DRAFT – FOR DISCUSSION

January 5, 2000

CONFIDENTIAL

Ms. Cindy Schamp
Chief Operating Officer
Saint Alphonsus Regional Medical Center
1055 North Curtis Road
Boise, Idaho 83706-1370

Subject: Valuation of 50 Percent Interest in Intermountain Medical Imaging LLC

Dear Ms. Schamp:

At your request, we have estimated the fair market value of Saint Alphonsus Regional Medical Center's ("SARMC") 50 percent interest in Intermountain Medical Imaging LLC ("IMI," or "the Center"), a joint venture between SARMC and Saint Alphonsus Radiology Group ("SARG"), as of September 1, 1999 (the "valuation date") on a going-concern basis. We understand that the purpose of this analysis is to assist SARMC's management in its decision concerning the valuation of its ownership interest in connection with the formation of the Center. Our valuation analysis may not be used for any other purpose nor distributed to any third parties without the prior written consent of PricewaterhouseCoopers LLP ("PwC" or "PricewaterhouseCoopers").

Based on the assumptions and limiting conditions as described in this report, as well as the facts and circumstances as presented to us by SARMC's management for the valuation date, we estimate SARMC's 50 percent interest in IMI to be approximately book value, or no greater than SARMC's cash contribution of approximately:

$622,000

This report describes the principles, assumptions, and procedures that were applied in our valuation analysis of the aforementioned equity interest. The findings stated in this analysis are based on data obtained directly from SARMC's management and from sources of publicly available information. In addition, certain information in our report is based on our interviews with representatives of SARMC. Management has advised us that they consider the data used to be accurate, and that no information known to them conflicts with the data or resulting use of such data in this analysis.

This letter and report should not be used, quoted or circulated in whole or in part for any other purpose other than that stated above. The PricewaterhouseCoopers name may not be used or referenced in connection with this letter and report in any public or private offerings including, but not limited to, those filed with the Securities and Exchange Commission or other government agencies. In addition, our findings are subject to the Statement of Assumptions and Limiting Conditions shown in Appendix I.

In the course of our analysis, we performed the following:

- Read the proposed Term Sheet for Intermountain Medical Imaging LLC;
- Read the pending Operating Agreement for the Center and associated exhibits;
- Read IMI's *pro forma* financial statements, including maximum, minimum and anticipated profit scenarios;
- Read the Capital Contributions and Debt Schedule of Intermountain Medical Imaging Center;
- Read the Market Value Appraisal Report of the real property in which IMI leases space; and
- Considered the impact of current industry trends and developments on the fair market value of IMI.

Because the procedures we performed during this engagement were limited in scope and did not constitute an attest service as that defined by the American Institute of Certified Public Accountants, we cannot express an opinion on the financial, statistical or other data included in our analysis or findings. Our valuation analysis in no way constitutes an opinion of fairness to any shareholders or an opinion of solvency.

According to the provisions of the Internal Revenue Code of 1986 (the "Code") as amended, all valuations of the stock of closely held corporations or the stock of corporations where market quotations are not available must be made in accordance with Revenue Ruling 59-60 for estate and gift tax purposes.[1] Revenue Ruling 65-192, as superseded by Revenue Ruling 69-609, 1968-2 C.B. 327, extended the concepts in Revenue 59-60 to income and other tax purposes as well as to business interests of any type. Closely held corporations are enterprises whose shares are owned by a relatively limited number of stockholders.

Among other factors, this valuation analysis considers Revenue Ruling 59-60, which, while not prescribing any formula for concluding on value, provides guidance on how to approach the valuation of business interests. In accordance with this guidance, the following factors, among others, have been considered to the extent applicable in our estimate of value for IMI:

A. The U.S. economic outlook in general and the condition and outlook of the industry in which IMI operates, in particular;

B. The nature of the business and history of the enterprise from its inception;

C. The book value of IMI and the financial condition of the business including its need for additional investment funds to realize its business objectives;

D. The earnings capacity of IMI;

E. The dividend paying capacity of IMI;

[1] Internal Revenue Service Ruling 59-60 1959-1 C.B. 237.

F. Whether or not IMI has goodwill or possesses any other intangible value;

G. Recent sales of the stock and the size of the block of stock to be valued;

H. The market price of publicly traded stock of corporations engaged in industries or lines of business similar to IMI.

For estimating the value of closely held corporations, Revenue Ruling 59-60 defines fair market value as, "...the price at which the property would change hands between a willing buyer and a willing seller when the former is not under any compulsion to buy and the latter is not under any compulsion to sell, both parties having reasonable knowledge of the relevant facts"[2]. The hypothetical buyer and seller are assumed to be able, as well as willing, to trade and to be well informed about the property and concerning the market for such property.

Although SARMC's 50 percent interest in IMI is not a controlling interest, the rights provided do afford the hospital some elements typically associated with control. According to the proposed Term Sheet, the LLC will have, at least initially, two members, each holding a 50 percent interest in the Center with equal representation on the Management Committee. Both entities have contributed an equal amount of capital and will share equally in the profits and losses of the Center. Neither entity has been granted supermajority voting rights nor any other rights which would result in one entity having more strategic control than does the other. Given these facts, SARMC does have some ability to influence the Center's strategic decisions. We therefore consider SARMC's interest to be a significant non-controlling interest rather than a minority interest.

The selection of the appropriate premise of value is an important step in defining the appraisal process. Typically, in controlling interest valuation assignments, the selection of the appropriate premise of value is a function of the highest and best use of the collective assets of the subject business enterprise. When appraising a minority interest, the correct premise of value should reflect business as usual for the subject company. In the unique case of valuing a minority or non-controlling interest in a start-up company, the tremendous uncertainty about the enterprise magnifies the importance of choosing the appropriate premise of value; the value conclusions reached under alternative premises of value, for the same business, may be materially different. For purposes of this analysis, we considered the fair market value of a 50 percent interest in IMI under the premises of *value as a going-concern.*

There are three basic approaches to the valuation of a minority interest in a closely held company: (1) a "top down" approach where the total enterprise value is computed from direct comparison with the values of controlling interest transactions of guideline businesses, which is then reduced by a minority or non-controlling interest discount reflecting its lack of control in the total entity; (2) a direct comparison approach that estimates the enterprise value of the subject company using values of minority interests in publicly traded guideline companies, which are then adjusted for lack of marketability; and (3) a "bottom up" approach which estimates the benefits the owners will realize over the life of the investment, considering the effects of lack of marketability if no easily accessible market is available to provide liquidity for the investment.

[2] Federal Estate Tax Regulations, Section 20.2031-1(b).

In arriving at our estimate of aggregate value of SARMC's 50 percent interest in IMI on a non-controlling interest basis, we have relied upon the "bottom up" approach. A "top down" approach was considered but rejected due to the early-stage nature of the entity. A direct comparison with publicly traded guideline companies was not performed because of the life cycle differences that exist between private ownership of an early stage company and ownership of an established publicly traded company.

INDUSTRY CONDITION AND OUTLOOK[3]

The health care industry (SIC 80) consists of public, private and non-profit institutions. These institutions include hospitals, offices and clinics of medical doctors, nursing homes, managed care providers such as health maintenance organizations ("HMOs"), preferred provider organizations ("PPOs"), independent practice associations, and other specialized health care facilities. The industry is labor intensive, employing approximately 10 million people in 1996, of whom more than 650,000 were physicians. National healthcare expenditures are expected to total $1.3 trillion in 1999, of which $235 billion will be spent for physician services. For purposes of this report, only the imaging segment of the industry was considered.

Many hospitals and other health care providers require access to diagnostic imaging services to remain competitive in the health care marketplace. At the same time, regulatory and licensing requirements in many states may limit access to imaging systems, while health care providers may lack the financial resources or sufficient patient volume to justify the high expense associated with the purchase of diagnostic imaging systems. Even if financial resources are available, some health care providers prefer to contract the services for many reasons, including, among others: to obtain the use of the system without any financial risk; to retain the ability to switch system types and avoid technological risk; to avoid future uncertainty with regard to reimbursement; to eliminate the need to recruit, train and manage qualified technologists; or to provide additional imaging services when patient demand exceeds in-house capability.

The diagnostic imaging segment of the health care industry is highly competitive, with numerous small facilities and a few large, diversified healthcare companies in each geographic market. In addition to hospitals that provide on-site imaging services, other competitors include multi-center imaging companies, local independent diagnostic centers, and imaging centers owned by local physician groups.

In IMI's defined geographic market, Boise already has two major hospitals providing full service imaging procedures: Saint Alphonsus Regional Medical Center and St. Luke's Regional Medical Center. In addition, there are two other imaging centers: Open MRI of Boise, owned by a publicly traded company, and HealthSouth Treasure Valley Hospital. In the state of Idaho, no certificate of need ("CON") regulations exist with respect to imaging centers. Consequently, other healthcare providers face few barriers to entry and may increase the competitive environment in which the Center currently operates.

[3] Information is derived from Industrial Forecast: 1998-2000, Richard K. Miller & Associates, p. 351-354; Standard & Poor's Industry Surveys; and 10-K filings of Alliance Imaging, Inc. and Diagnostic Health Services, Inc.

In general, there is a growing trend for healthcare services on an outpatient basis, fueled by advances in technology, demands for cost-effective care, and concerns for patient comfort and convenience. However, the healthcare industry in the U.S. is subject to regulation at the federal, state and local levels. Regulations can affect companies' growth, require licenses and/or facilities certification, and control the reimbursement to the health care provider for services provided. Over recent years, as technology has improved and the population has aged, the scope of imaging procedures provided has widened to include more patients covered by Medicare and Medicaid. This has resulted in a small but growing percentage of imaging services revenue being reimbursed by government programs. Given the uncertainty surrounding government reimbursement and regulation, the ability of health care providers to accurately predict their financial performance becomes even more difficult.

NATURE AND HISTORY OF INTERMOUNTAIN MEDICAL IMAGING

General

Intermountain Medical Imaging was formed on September 1, 1999 as an Idaho Limited Liability Company by two members: St. Alphonsus Regional Medical Center, a local hospital, and Saint Alphonsus Radiology Group, a physician's group, for the purpose of owning and operating an Independent Imaging Center in Boise, Idaho. The Center provides medical imaging services in the following areas: computed tomography ("CT"), ultrasound, mammography, and radiography, as well as special procedures. In addition, the Center has a computed radiography and picture archiving communication system (PACS) that is integrated with SARMC's information systems.

IMI is located in a free-standing imaging center in downtown Boise, Idaho. The Center leases 4,950 sq. ft. from Gem State Radiology and operates five days per week on a regular basis and six days when necessary, a key factor in the delivery of imaging services.

Capitalization of IMI as of September 1, 1999

The Center is a 50/50 joint venture LLC owned and operated by two members: SARMC and SARG, both located in Boise, Idaho. As a new business in the diagnostic imaging field, significant capital requirements were necessary to begin operations. The investment in equipment for start-up operations totalled $3.5 million, while initial working capital requirements to fund projected losses amounted to $550,000. The investment in equipment was financed by a long-term loan, the conditions of which required a 20 percent down payment, or approximately $700,000. In addition to this debt financing totalling approximately $2.8 million, each member contributed an equal amount of capital in cash to fund working capital requirements and the equipment loan down payment. Total equity of $1.2 million, combined with the debt financing, brings the total invested capital of the Center to approximately $4.0 million.

FINANCIAL REVIEW

Only a forward-looking financial review of IMI as of the valuation date is possible using the *pro forma* financial statement scenarios contemplated by management. Due to the high level of uncertainty surrounding the assumptions and resulting cash flows of the newly formed Center, its projections are not as meaningful as historical operating results of established businesses. Financial projections of newly established businesses are typically highly uncertain due to forecasting errors experienced when projecting staffing requirements, overhead costs, and volume of services, among other variable expenses. Higher scan volumes allow the company to benefit from the operating leverage due to a high fixed cost expense structure, resulting in increased profitability. However, the opposite is true of lower scan volumes. As a consequence, small changes in revenue can greatly affect profitability, leading to above average financial risk. In addition, IMI has entered a highly competitive environment in which it competes with well-established imaging centers associated with existing physician referral networks. Thus, given the operating and financial risk that IMI faces and the highly competitive market in which it operates, the achievement of anticipated financial projections is highly uncertain as of the valuation date.

Discussion of Opening Balance Sheet

IMI's opening balance sheet as of September 1, 1999 is shown in Exhibit I. As of the valuation date, the Center had total assets of approximately $4.0 million; $3.5 million or 86 percent of which was classified as fixed assets. Current assets consisted of cash in the amount of $550,000, or 14 percent of total assets.

Total liabilities as of the valuation date were approximately $2.8 million, which represented the equipment loan financing used to capitalize the business. In addition, a line of credit is available to meet working capital needs, but had not yet been drawn upon as of the valuation date. The long-term loan was collateralized by the underlying equipment, while the line of credit would be collateralized by accounts receivable if drawn upon. The high leverage results in substantial financial risk for the Center, as evidenced by its high debt to equity ratio of 2.2:1. Debt to total invested capital ratio is 69 percent.

Net Asset Value

The Center's net asset value ("book value") as of the valuation date was approximately $1.2 million. As mentioned above, IMI is capitalized with equal cash contributions from each of the members as well as the equipment financing, for a total of approximately $4.0 million. Because the Center began operations on the valuation date, there was no impact from operations on retained earnings, nor the net asset value of the Center.

In valuing established companies, book value does not necessarily represent going concern value, as it is an accounting term, not an appraisal term. Financial statement assets are accounted for at historical cost, less depreciation, while some assets may be completely written off for financial reporting purposes. Intangible assets normally do not appear on the balance sheet unless they were purchased or the actual cost of development is capitalized. Neither contingent

assets nor contingent liabilities are generally recorded, and liabilities are usually shown at face value. Therefore, a company's contributed equity capital may not bear an identifiable relationship to going concern value for the business as a whole.[4] However, in the case of IMI, which has no operating history and highly uncertain future earnings, book value is likely a reasonable estimate of fair market value. As of the valuation date, IMI began operations. As such, the assets have not been depreciated nor written down, there are no identifiable intangible assets or contingent liabilities, and the liabilities' face value approximates fair market value. In a start-up situation such as this, the net asset value of a company is equivalent to the contributed equity capital, and is a reasonable estimation of the going concern value for the business as a whole.

Intangible Assets and Goodwill

An intangible asset is a right or non-physical resource that is presumed to represent an advantage to the firm in the marketplace. Such assets include copyrights, patents, leases, franchises, and goodwill, as well as other assets. "Intangible assets are the elements, after working capital and tangible assets, that make the business work and are often the primary contributors to the earning power of the enterprise. The existence of intangible assets, including goodwill, is dependent on the presence, or expectation, of earnings."[5] Goodwill, as defined by Revenue Ruling 59-60, is "the customer patronage of a business, name of the business, ownership of a trade name or brand name, location of the business, and a renewal of successful operations over a prolonged period." As the evidence of goodwill results from "the measurement of historical or expected earnings in excess of the normal industry return on all other tangible and intangible assets,"[6] ascribing goodwill to a start-up business with no operating history and highly uncertain future earnings is not appropriate in this instance.

Prior Transactions

Revenue Ruling 59-60 lists any previous transactions of stock or recent sale of the entity being valued as a factor to be considered in arriving at an estimate of its fair market value. Based on our discussions with management, no transactions in IMI's common stock had occurred as of the valuation date.

VALUATION

Introduction

A Market Approach establishes the value of a privately-held corporation through analysis of transactions of guideline companies. The information derived from this analysis is used to infer an opinion of market value for the subject company. In an Income Approach, value is dependent upon the present value of future economic benefits to be derived from ownership. A price per

[4] Shannon Pratt, Valuing a Business (Homewood: Dow-Jones Irvin, 1989) p.29.
[5] Smith, Gordon V. and Parr, Russell L., Valuation of Intellectual Property and Intangible Assets, Second Edition, p. 83.
[6] Danzig, Lawrence H., and Robison, Robert A., The Tax Adviser, January 1980, p. 33.

share or interest is then estimated by discounting the net cash flows available for distribution to their present value at market-based rates of return. The Cost Approach focuses on the present; it utilizes estimates of the current cost to replace the entity's fixed assets and certain intangible assets.

A valuation analysis of a start-up company typically differs from traditional approaches applied to a more established enterprise. A start-up company has a very limited operating history and, as such, historical trends and ratios cannot be used to develop financial forecasts. When financial projections are available, the achievement of projected results is often highly uncertain and often differs from actual results attained. Management of SARMC provided us with several financial projection scenarios due to the uncertainty associated with the operations of the entity. For example, there is no assurance that physicians will refer patients to IMI over other imaging centers or hospitals in the area, a crucial factor in an imaging center's success. These limitations and others make it difficult to apply an income approach to valuation, which depends on the availability of reasonable and reliable management projections.

The application of a market comparable approach to valuation is also difficult. A start-up company typically has negative earnings and cash flows, while its revenues may be growing very quickly. Applying guideline company multiples from recent transactions would likely not yield meaningful results. Moreover, publicly traded guideline companies often are much larger than the subject start-up company and have achieved stable and somewhat more predictable growth rates. The multiples paid by investors for established publicly traded companies reflect both an expectation of lower risk and a different level of future growth, and therefore may not be an appropriate benchmark of value for a start-up company.

Asset Accumulation Approach

Based on our analysis and understanding that IMI began operations on the valuation date, an asset based valuation approach is an appropriate method to estimate the fair market value of SARMC's 50 percent interest in IMI. An Asset Accumulation Method essentially restates a company's balance sheet to fair market values. This approach involves the identification and valuation of otherwise unrecorded tangible and intangible assets, if any, as well as the revaluation of the asset and liability accounts already recorded on the company's GAAP balance sheet. The value of the individually appraised assets less the value of the individually appraised liabilities represents an estimate of the value of the entity.

The advantage of applying an Asset Accumulation Method, in IMI's case, stems from its lack of operating history and uncertain future as of the valuation date. IMI's assets and liabilities, therefore, had not yet been adjusted and hence, the balance sheet as of the date of formation of the Center is a reasonable estimation of the fair market value of the equity of IMI as of the valuation date, or approximately $622,000.

APPLICATION OF DISCOUNTS

The value of SARMC's interest in IMI, as described above, was prior to any consideration for

discounts for lack of marketability or ownership interest transfer restrictions. As with most closely held enterprises, the factors that may give rise to a discount for lack of marketability include: a lack of willing buyers for the interest; an uncertain time horizon to complete a potential sale; the cost of the sale or liquidation, as well as the risk as to the eventual form of transaction proceeds; restriction on transferability of interest; and the intent of the owners with regard to the investment. In the case of the Center, there is no public market for its equity as of the valuation date, nor is a public market anticipated. Transfer of SARMC's ownership interest is restricted according to the Term Sheet, as SARG maintains a right of first refusal on SARMC's interest. However, given the competitive nature of the industry and strong merger and acquisition activity, it could be reasonably anticipated that liquidity does exit for a 50 percent ownership interest in the Center as of the valuation date.

The subject of whether or not a discount for lack of marketability should be applied to a *controlling* interest has been and is being debated among valuation experts.[7] In our view, lack of marketability is less of an issue for a controlling interest than for a minority interest, primarily since a controlling shareholder can effect the sale of a company, cause dividends to be paid, or cause a repurchase of shares, all of which tends to compensate for lack of liquidity. However, even controlling interests in private companies can be less readily marketable than public companies. Reasons for this include difficulties in selling private companies and the unwillingness of private company owners to publicly auction their companies as is typically required by public companies.

Although SARMC does not own a controlling interest in the Center, it does own a significant non-controlling interest. Its 50 percent interest allows it to greatly influence the strategic decisions concerning IMI, including the ability to, among others, select management, establish compensation and benefits, set corporate strategies, acquire or liquidate assets, and liquidate, sell or recapitalize the Center. Therefore, SARMC's 50 percent ownership interest in the Center possesses many of the characteristics of a controlling interest.

According to an article published in the *Business Valuation Review*,[8] Christopher Mercer suggests that there are two potential costs, transaction costs and taxes, that should be considered in the determination of an appropriate lack or marketability discount. Mercer suggests that transaction costs for smaller businesses can range from 10 percent or more, while for larger businesses, transaction cost would be much smaller as a percentage of value. He also assumes that taxes will always be paid by the selling shareholders. Depending on the market capitalization of the subject company, Mercer indicates that the appropriate lack of marketability discount for a controlling, non-marketable interest ranges from 3 to 20 percent.

As the estimated market capitalization for IMI is $4.0 million, Mercer's guideline would suggest a lack of marketability discount in the range of 15 to 20 percent, assuming a controlling interest. However, SARMC does not have the control necessary to cause strategic decisions to be made, but does have control to suppress strategic decisions, all else being equal. While the combination of factors present in IMI as of the valuation date suggest the application of

[7] Mercer, Z. Christopher, "Should Marketability Discounts be Applied to Controlling Interests of Private Companies," *Business Valuation Review*, June 1994.
[8] Mercer, Z. Christopher.

discounts would likely be appropriate in this instance, we have considered the purpose of the valuation, the intent of the parties, and the operational versus investment interest in the Center. Evidence suggests that if the parties anticipated selling their interests, we might expect a discount for lack of marketability. However, given their intent to hold their investment as an operational investment with a community interest, we have not taken a discount in arriving at our conclusion.

SUMMARY AND CONCLUSION

As discussed above, we have estimated the fair market value of SARMC's 50 percent interest in IMI as of September 1, 1999 using the Asset Accumulation Approach. We have relied on the Asset Accumulation Approach due to the early stage nature of the business. In this instance, the Center's net asset (book) value is a reasonable proxy for fair market value as the Center commenced operations as of the valuation date. Thus, we have relied upon information supplied to us by SARMC concerning the Center's opening balance sheet and its net asset value in arriving at our estimate of fair market value, prior to consideration for any discounts for lack of marketability. In light of the current industry conditions and the facts and circumstances surrounding SARMC's investment in the Center, we have not applied any discounts in this instance.

Based on the analysis and considerations described in this report, we have estimated the fair market value of SARMC's 50 percent interest in IMI on a non-controlling interest basis to be approximately $622,000.

Should you require any additional information, please do not hesitate to contact Raina Dennison at (617) 478-9504, Allen D. Hahn at (617) 478-9018 or David A. Spieler at (617) 478-5057 in our Boston office.

Very truly yours,

Exhibit I

Opening Balance Sheet

SARMC08058
Office of the CFO

Exhibit I

Opening Balance Sheet - as of September 1, 1999

ASSETS	
Cash	$550,000
Fixed Assets	$3,466,673
Total Assets	$4,016,673
LIABILITIES	
Long Term Loan	$2,773,338
Total Liabilities	$2,773,338
SHAREHOLDERS' EQUITY	
Capital Contributed	$1,243,334
Total Equity	$1,243,334
Total Liabilities and Equity	$4,016,673

SARMC08059
Office of the CFO

APPENDIX I

Statement of Assumptions and Limiting Conditions

SARMC08060
Office of the CFO

Statement of Limiting Conditions

The following Statement of Limiting Conditions applies to valuation services performed by PricewaterhouseCoopers LLP ("PwC").

Valuation reports may contain estimates of future financial performance, or opinions that represent management's view of reasonable expectations at a particular point in time, but such information, estimates, or opinions are not offered as predictions or as assurances that a particular level of income or profit will be achieved, that events will occur, or that a particular price will be offered or accepted. Actual results achieved during the period covered by the prospective financial analyses will vary from those described in our report, and the variations may be material.

PwC does not, as part of these services, perform an audit, review, or examination (as defined by the American Institute of Certified Public Accountants) of any of the historical or prospective financial information used, and therefore does not express any opinion with regard to same.

Our procedures did not include investigation of, and we assume no responsibility for, the titles to, or any liens against Intermountain Imaging Center ("IMI" or "the Center"). Furthermore, we assume there are no hidden or unexpected conditions that could affect the value of IMI and accept no responsibility for discovering such conditions.

None of our partners or employees who worked on this engagement has any known financial interest in the outcome of this valuation. Further, the compensation for this engagement is neither based nor contingent on the value determined.

Neither the report nor any portions thereof (especially any conclusions as to value, the identity of the appraisers or PwC, or any reference to recognized appraisal organizations or the designations they confer) shall be disseminated to the public through public relations media, news media, advertising media, sales media, or any other public means of communication without the prior written consent and approval of the appraisers and PwC. The date(s) of the valuation to which the value estimate conclusions apply is set forth in the letter of transmittal and within the body of the report. The value is based on the purchasing power of the United States dollar as of that date.

In the absence of competent technical advice to the contrary, it is assumed that IMI is not adversely affected by concealed hazards such as, but not limited to asbestos, hazardous or contaminated substances, toxic waste, or radioactivity.

No opinion is rendered as to property title, which is assumed to be good and marketable. Unless otherwise stated, no consideration is given to liens or encumbrances against the property. Sketches, maps, photos, or other graphic aids included in appraisal reports are intended to assist the reader in ready identification and visualization of the property, and are not intended for technical purposes.

Tax positions taken by St. Alphonsus Regional Medical Center or IMI, which utilize the results of our work, are the responsibility of the taxpayer.

Confidential Draft for Discussion

Restructuring of MRI Associates General Partnership

Scenario 5

SARMC withdraws from MRI Associates to provide flexibility to form potentially competing ventures

Considerations

1) ***The Partnership Agreement restricts the ability of Hospital Partners to withdraw from MRI Associates.*** A Hospital Partner may withdraw at any time if, in the Hospital Partner's reasonable judgement, continued participation in MRI Associates:
   - jeopardizes the tax-exempt status of the Hospital Partner;
   - jeopardizes medicare/medicaid or insurance reimbursements or participations;
   - if the business activities of MRI Associates are contrary to the ethical principles of the Roman Catholic Church; or
   - is or may be in violation of any local, state or federal laws, rules or regulations *(Articles of Partnership, Section 6.1)*

2) SARMC would be restricted for a period of one year after becoming a Terminated Partner from engaging in any Competitive Activity *(Third Amendment to Articles of Partnership, Section 8.1)*

3) A favorable vote of ***all*** current members of the Board of Partners can waive the Partnership's rights with respect to any particular activity and Restricted Party *(Articles of Partnership, Section 9.4)*

4) The appearance of shifting referrals may potentially result in legal challenges from GP and LP interest holders, and investigations from State and Federal authorities

5) Unless otherwise agreed, SARMC would receive the balance of its Partner's capital account at the time of withdrawal *(Articles of Partnership, Section 6.1)*

6) Withdrawal would not relieve SARMC from any contingent liability in existence at the time of withdrawal *(Articles of Partnership, Section 6.3)*

7) SARMC would retain limited partnership interests in Idaho and Mobile

EXHIBIT C

EXHIBIT C

410 South Orchard Avenue, Suite 116
P.O. Box 8359
Boise, Idaho 83707

Physician Management Incorporated

Fax Cover Sheet

To: Carl Harder From: J. Cliff

Fax: 331-9278 Pages: 2

Phone: 331-9200 Date: 8-10-99

Re: CC:

☐ Urgent ☐ For Review ☐ Please Comment ☐ Please Reply ☐ Please Recycle

Message:

EXHIBIT
4095

033755

331-9278

The purpose of this letter is to document the cooperation between Saint Alphonsus Regional Medical Center, MRI Associates and Intermountain Medical Imaging. Final negotiations are proceeding between SARMC, MRI and IMI on SARMC and MRI becoming part owners of the CT and MRI divisions respectively of IMI. Both SARMC and MRI reviewed and approved the IMI budget projections as part of this process.

The agreement between SARMC and IMI is an estimated 60 days out. SARMC has already made a number of tangible investments into IMI, including the following:

- SARMC provided its case volume, database, technical component charges, staffing and supply costs, and other operational data for IMI reference in developing the IMI business plan.
- Karen Noyes, assistant director of the SARMC radiology department, is joining IMI as executive director.
- SARMC programmers have interconnected the SARMC and IMI computers to share demographic and case management data between SARMC and IMI.
- SARMC has linked IMI to its intranet between the hospital and its physician network, the Clinician Desktop system.
- Subsequent to IMI contracting to purchase the DR Systems digital radiology system, SARMC discontinued its negotiations with another vendor and also began working with DR Systems, so that SARMC and IMI will be using the same type of systems. This entails a system conversion and investment of several hundred thousand dollars for SARMC.

The Saint Alphonsus Radiology Group physicians have for 25 years worked closely with SARMC and contracted with SARMC to provide the professional medical services for the radiology department at SARMC. This contract has just been extended five years. In respect of the SARMC cooperation and intended ownership position in IMI, the radiologists declined on jointly developing an imaging center with the Idaho Elks Rehabilitation Hospital.

The agreement between MRI and IMI is 60 or more days out. An appraisal is being completed by Price Waterhouse, Boston. In regard to the MRI affiliation with IMI, the following are noted:

- Members of the MRI Associates board have communicated their full support of the MRI ownership in IMI and IMI ownership in MRI, and committed their votes in favor of the cross ownership.
- MRI has offered for IMI to lease employees from its pool of 40 experienced MRI technologists on an as needed basis.
- The managing partner of IMI is on the board of MRI Associates, and is highly regarded by both groups.
- IMI and MRI share the same financial manager, Practice Management, Inc., and other key professional resources.

The Saint Alphonsus Radiology Group physicians have for many years provided the professional medical services for MRI cases at MRI Limited, and continue to do so.

EXHIBIT D

EXHIBIT D

MINUTES
GROUP MEETING
SEPTEMBER 8, 1999

In attendance: Joe Gobel, David Giles, Paul Traughber, Vic Garabedian, Neil Davey, Ian Davey, Jeff Seabourn, John Knochel, Jeff Cliff, Paul DeWitt, Karen Noyes and Kathy Sharpe, Secretary.

I IMAGING CENTER UPDATE

A. Karen presented a site update (see attachment). The exterior on the north side is nearly complete and the signs should be ready on time. The interior finishing work is progressing with approximately 90% of the artwork having been hung.

B. The referring physicians need to be reminded that they need to sign the order form in order to have the correct ICD-9 codes.

C. When reading cases from the center, the case needs to be identified as to whether it is an IMI case or not. The patient's date of birth is currently being used as the medical record number. Karen requested that if a Radiologist takes an IMI case back to the hospital, that they let someone at the front desk know so that the case can be tracked.

D. The problem with the MRI unit has been fixed. The RF shielding had a leak into the fire alarm RF filters. These have been sealed and everything is up and running well and the images look great. Dr. Seabourn would like to have the missed application time restored due to the magnet being down. Karen will check into this.

E. Karen stated that the repaired Lumysis system as yet to be delivered. Currently, plain films cannot be taken without this system. Karen will check to see if DR has a Lumysis system with Dr loaded on it. Dr. Knochel motioned to forget the Lumysis and install the AGFA CR that is in storage and call DR to see how quickly they can supple a digitizer that is DR configured. Dr. Gobel seconded the motion and the motion passed. Karen will follow-up with DR.

F. Karen presented an Emergency Medication and Treatment Protocol handout for review. Dr. Gobel stated that ACLS training can be done as a group in three sessions. Drs. Knochel and Ian Davey are already trained and certified and will cover the department during these training sessions. Dr. Gobel will set the first session up for Wednesday, September 15, 1999.

G. Karen cautioned the Group not to promise too much to referring physicians, as the center will need to continue to meet the standards of practice and protocols. Dr. Seabourn would like to see what screening questions other offices are currently asking patients and see if this can be streamlined.

EXHIBIT E

EXHIBIT E

Confidential

Emailed approval 9/20/01

Attorneys Eyes Only

IMI MANAGEMENT
MINUTES

DATE: August 14, 2001
TIME: 5:30 p.m.
PLACE: Pioneer Room

PRESENT:
Jeff Cliff
Tim Hall, MD
Jeff Seabourn, MD
Neil Davey, MD
Joe Gobel, MD
Karen Noyes
Ken Fry
Mike Ondracek
Leslie Kelly Hall
Scott Christensen

EXCUSED:

RECORDER:
Karen Noyes

I. *ASSIGNMENTS*

Decision made that Dr. Seabourn would be the IMI Chair, and Ken Fry would be the SARMC Vice Chair.

Jeff Cliff will be delegated responsibility of ICR Chair. For Executive sessions, the Chair will decide if Jeff Cliff should chair that portion of the board meeting.

Motion **Motion made to modify the operating agreement to include four members as representatives from ICR and SARMC instead of three. Motion approved unanimously.**

II. *PHYSICIAN REFERRAL PATTERN*

See attached graphs on physician referral patterns and SARMC/IMI split on referring physicians.

Discussed information regarding St. Luke's opening an outpatient Imaging Center with PACS system.

IMI West update with timeline of May 2002 opening. Cherry Lane target of October 2002.

EXHIBIT
4231

IMIRP/000886

III. CONTRACT

In order to complete the operating agreement the board needs to execute a Medical Director Agreement, and Service Level Agreement.

Mike Ondracek will provide Jeff Cliff with some examples of Medical Director agreements for review by ICR.

Leslie Kelly-Hall will prepare a service level agreement for review by the board.

IV. FEES & FINANCE

IMI is covering any negative cash balances in the non-MRI component with cash from the MRI component. Board agreed unanimously to charge interest monthly, at the same rate as our line-of-credit with U.S. Bank on the negative cash balance.

Jeff Cliff presented the current financial statements:

Jeff Cliff reported that the Group has been approved for financing of IMI West. Dr. Seabourn conveyed a message from US Bank Account VP that things are looking good; ratio benchmarks are being surpassed when looking at IMI as a whole.

PET Billing discussion

Owned by IMI; parked at SARMC.

Medicare in-patients must be billed under APC schedule.

When coach is at IMI West, must bill under the physician fee schedule.

Motion **Motion made to have St. Als "lease" PET from IMI and bill Medicare patients under APC schedule. Approved unanimously.**

SUBCOMITTEE: Mike Ondracek, Ken Fry, and Jeff Cliff will work on the contract for the lease agreement, reimbursement, etc for Medicare.

V. MARKETING

Dr. Neil Davey presented an overview of the history and development of IMI's marketing plan.

Background:

Marketing consultant hired.
Continued sponsorship of the Shakespeare Festival.
Focusing on non-MRI component
Medical education event – slated form October 6th at Grove Hotel
August 13th – Dr. Ed Coleman – Dinner/lecture/educational event. PET expert from Duke University will do Grand Rounds at SARMC.

Physician office visits to continue and upgraded for PET.

Web Page – Vendor selection in progress. Go live date of October 2001. Leslie offered many "tips" when working with marketing web site vendors, etc. She has also offered her assistance in whatever level IMI would like. The marketing committee will review RFP's from web page vendors.

Have seen results in the growth of the non-MRI numbers in the last 18 months of marketing

VI. *OPERATIONS*

Focus on DR and connectivity. Emphasize contribution of Information Resources as a key component of our success. Need IR to be adequately staffed and funded to grow!

Concern with DR Communicator – Web Base product and not being "live" after 18 months of operation at IMI. Leslie reports dark fiber is all in place ($780,000 investment by SARMC) to IMI West, Cherry Lane, and Caldwell for connectivity.

DR – Communicator Button

- Firewall completed
- Internet pipe increased by 70%
- Security verified
- Programming done
- DR is working to re-architect port site to allow connection to internet/SARMC. Unknown completion date.

Outstanding DR Issue

- Multi-entity connectivity – not available yet by DR. Slated for November 2001. This will allow viewer to mix all entities together (SARMC, IMI, MRICI) or to view independently/separately.

Laptops - DR

- Exist at about 20 sites now
- Having difficulty getting written "feedback" from physician offices, but good verbal feedback

ACTION: Leslie to present a report on the following at each meeting:

- Physician feedback – DR – response
- Report specific to IMI or calls, response time, etc
- DR communicator update from SARMC/DR

VII. ***PET Site***

Cindy Schamp has met with the MRICI group and discussed our use of the current MRI Mobile pad at SARMC. MRI is okay with sharing the use of the pad.

ACTION: Jeff Cliff to contact Cindy Schamp to ask MRICI if IMI can share the semi to pull our PET off the pad and park it in the RV parking lot behind Liberty when they need to utilize the pad.

VIII. ***NEXT MEETING***

Adriana to organize an IR committee to work on IMI West connectivity.

Meetings will be held once a month for the next six months at 6:00 a.m. Jeff Cliff to schedule next meetings.

Approved By:

Date: 9/24/01

9/24/01

EXHIBIT F

EXHIBIT F

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Attorneys Eyes Only

Email Cellphone 1/17-02

MARKETING COMMITTEE
MINUTES

DATE: November 28, 2001
TIME: 12:00 p.m.
PLACE: Radiology Conference Room

PRESENT:
Neil Davey, MD
Ian Davey, MD
Joe Gobel, MD
Jeff Cliff
Rachel Bergmann

EXCUSED:
Tim Hall, MD
Karen Noyes

RECORDER:
Nicole Lindauer

I. *LUNG CANCER SCREENING*

Kim Carley to contact Dr. Neil Davey regarding presentation on channel 2.

II. *IMI/SARMC MARKETING*

Ken Fry is making arrangements to have one of SARMC's marketing members present at IMI Marketing meetings. The committee to look at splitting IMI marketing and SARMC marketing into two meetings.

Continue to keep IMI brand name in the public to bring in business that we do not currently have at SARMC. SARMC and IMI to work towards a combined market share. If IMI is full, will transfer patients to SARMC and vise versa.

III. *REFERRAL NUMBERS*

Rachel Bergmann broke out information on each of the events and how the referral numbers looked prior to and after. See attached.

Shakespeare – Use as a fundraising venue for Shakespeare.

CME - Did not change where physicians sent their patients, will need to reevaluate.

IV. *DR STRATEGIC PLANNING*

Current PACS Committee consists of Rachel Bergmann, Karen Noyes, Chris Hayden, Leslie Kelly-Hall, Mark Wenstrom, Scott Christensen, Terry Krogstad, Dr. Seabourn and occasionally Drs. Knochel and Scales. Continue to make sure Drs. Seabourn and Scales working on same page as Marketing Committee.

EXHIBIT
4248

GSRRP/000661

Quarterly evaluations on volumes are compared to SARMC, IMI and MRICI, having each pay their share for the rollout.

Leslie Kelly-Hall working on getting more support staff to begin office follow-up. Key to success is backup service and follow-up.

The Web Ambassador will not be available over the Internet. Will be using direct Ambassador software, which has a more secure connection. Already have the Ambassador software, just need to distribute it. Holdup is staff, and may have problems with connectivity due to need for broadband.

Drs. Neil and Ian Davey to look at marketing to the Djernes Group in Nampa. Rachel Bergmann to contact.

V. *NEWSLETTER*

Dr. Scales has made some changes. After changes made, Rachel will bring the proof back to Dr. Neil Davey to sign off.

VI. *WEBSITE*

Rachel discussed the maintenance plan with Wirestone. Rachel will continue to batch changes or additions for Wirestone to maintain. The Radiologists need to get an image library set up, not only to include images off of each modality, but logos, maps, picture of the buildings, etc. Changes to occur quarterly.

Wirestone may be able to put in tracking capability to see areas where the site is getting the most hits.

Working on having the newsletter on archive.

VII. *PET*

Discussion of Dr. Sawyer picking days for patients to be scanned. Drs. Neil and Ian Davey to revisit Dr. Sawyer.

Drs. Neil and Ian Davey and Rachel to meet with Pulmonologists. Currently only getting referrals from Dr. Crowley.

Blue shield, not participating in the reading (professional component). Worth accepting what's allowable from Blue Shield on the PC to help generate business on the TC. Jeff Cliff to discuss with PMI.

Requisitions coming steadily. With recurrent breast cancer and tracking of treatment, numbers should increase.

Approved By:

Date: 01/17/02

1-16-02

CME
36 Physician and Medical Providers attended

**Average monthly referral of 152 for the 3 months prior to the CME

**114 referrals noted for the Month of October, will continue to monitor for the next couple of months.

Shakespeare
27 Physicans and Medical Providers RSVP'd

**Average monthly referral of 243 for the 3 months prior to Shakespeare
**Average monthly referral of 214 for the 3 months after August 4th

DR
Communicator
26 Physicians and Medical Providers have access to Communicator since September

**Average monthly referral of 134 for the 8 months prior to Communicator being available
**Average monthly referral of 110 a month for the last 2 months after Communicator has been available, will continue to monitor

Communicator/Pilot
7 Physicians have both the Communicator and Wireless laptops available to them

**Average monthly referral of 49 for the 2 months prior to pilot install
**Average monthly referral of 35 for the month after the pilot install
**Average monthly referral of 33 after the Communicator was available

Wireless Pilot
68 Physicians and Medical Providers have access to a Wireless Laptop

**Average monthly referral of 526 for the 2 months prior to the pilot installs
**Average monthly referral of 578 for the 7 months after the pilot installs

IMI MARKETING COMMITTEE REPORT
NOVEMBER 2001

CURRENT PROJECTS :

NEWSLETTER :
- January distribution
- Lead articles – IMI West, Women's imaging
  - IMI West – Architectural illustration
    - Floor plan
    - Site photo
  - Women's imaging – role of MRI in cervical cancer
- Biographies of the three new IMI Radiologists
- Draft of second edition to authors

WEBSITE :
- Now online – www.idahoxray.com or www.aboutimi.com
- Updated quarterly

CME :
- Currently twenty video recordings distributed (10 to physicians)

FUTURE PROJECTS :

IMI WEST :
- *Ongoing marketing* efforts – Newsletter and website
- New marketing efforts – MD to MD office visits (Meridian zip codes)
  - Press : Newspaper, TV, Radio (NPR)
  - Open house

IDAHO SHAKESPEARE FESTIVAL :
- Host the opening night of sponsored play
- Six tickets per play – distributed to staff

EXHIBIT G

EXHIBIT G

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INTERMOUNTAIN MEDICAL IMAGING™

OUTPATIENT RADIOLOGY CENTER

Magnetic Resonance

Computed Tomography

Ultrasonography

Bone Density Scanning

Mammography

Vascular/Interventional

Fluoroscopy

General Radiology

BOARD CERTIFIED RADIOLOGISTS

Ricardo R. Abalie, M.D.

Ian C. Davey, M.D.

Neil C. Davey, M.D.

Vick Garabedian, M.D.

David Giles, M.D.

R. Joseph Gobel, M.D.

J.T. Hall, M.D.

John O. Knochel, M.D.

William T. Murray, M.D.

Diane R. Newton, M.D.

Jeffrey T. Seabourn, M.D.

Lisa M. Scales, M.D.

Paul Traugaber, M.D.

DIRECTOR OF MEDICAL IMAGING

Karen Noyes, B.S., R.T. (R)(CT)

October 4, 1999

VICKEN GARABEDIAN, MD
1055 N CURTIS RD
BOISE, ID 83706-1352

RE: Opening of Intermountain Medical Imaging Outpatient Radiology Center

Dear Dr. GARABEDIAN

We are proud to announce the opening of Intermountain Medical Imaging. This brand new state-of-the-art facility is the first full service outpatient radiology center in the Treasure Valley. As a physician group, we have always been committed to providing high quality service to our valued clinical colleagues. Additionally, we also pride ourselves in staying on the technological cutting edge of diagnostic imaging. In that tradition, we are making a paradigm shift away from our current film-based system to a filmless image management system. We will be using computers to display, archive, transmit, and restore images at our facility. This process will include all digital imaging modalities: MRI, CT, US, standard x-rays, fluoroscopy, and special procedures. Mammography will continue to utilize a film-based medium for the foreseeable future.

This change will have several benefits for you and your patients:

- Lost records will be eliminated—all images will be permanently archived in a digital format on CD ROM or DVD discs.
- Images and reports will be available more promptly.
- A paper image "montage" of the Radiologist's key selected images will be mailed with a final typewritten report sized for your patients' charts.
- Access to subspecialty Radiologists will be improved.
- When fully implemented, you will be able to access images and audio report summaries via computer at remote locations such as the O.R. or in your office. We will be scheduling office visits to evaluate your current computer infrastructure so that we may determine the most effective way to transmit data to you.
- Hazardous waste associated with traditional film and chemicals will be eliminated.

EXHIBIT
4107

977 WEST MYRTLE STREET (CORNER OF 9TH AND MYRTLE) BOISE, IDAHO 83702 333-9729 (333-XRAY) TOLL FREE IN IDAHO 877-333-9729 WWW.IDAHOXRAY.COM

GSRRP/000218

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INTERMOUNTAIN MEDICAL IMAGING

OUTPATIENT RADIOLOGY CENTER

Magnetic Resonance

Computed Tomography

Ultrasonography

Bone Density Scanning

Mammography

Vascular/Interventional

Fluoroscopy

General Radiology

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Paul Traughber, M.D.

DIRECTOR OF MEDICAL IMAGING

Karen Noyes, B.S., R.T. (R)(CT)

During the upcoming implementation, our staff will be trained to use this new system. Although we are working diligently to ensure a smooth transition, we anticipate some growing pains. Our goal is to improve upon your current level of service. So, please let us know immediately if you are inconvenienced in any way.

Many physicians are accustomed to receiving copies of film to review in their offices. Our long-term goal is to eliminate film completely, but we will maintain the capability to produce film copies of exams as well. We would appreciate you trying our new system which, when fully implemented, will improve access to images and reports.

You may review imaging studies performed at Intermountain Medical Imaging from an Ambassador computer monitor in the St. Alphonsus file room. The simple program takes less than five minutes to learn. We are available to provide orientation at your convenience.

Enclosed please find an informational brochure on our facility as well as an order pad. If you are unfamiliar with our group of Radiologists or are interested in more detailed information, we invite you to visit our website at: www.idahoxray.com.

We invite your feedback and open discussion. We look forward to serving your medical imaging needs.

Warm regards,

Your Colleagues at Intermountain Medical Imaging

927 WEST MYRTLE STREET (CORNER OF 9TH AND MYRTLE) BOISE, IDAHO 83702 333-9729 (333-XRAY) TOLL FREE IN IDAHO 877-333-9729 WWW.IDAHOXRAY.COM

EXHIBIT H

EXHIBIT H

January 4, 2000

Sandra Bruce
President and CEO
Saint Alphonsus Regional Medical Center, Inc.
1055 N. Curtis Road
Boise, Idaho 83706

Dear Sandra,

Dr. Curran and I have reviewed with the other members of Doctors Corp our impressions of the meeting we attended with you and the radiologists on December 16, 1999. This letter is intended to communicate our feelings on that meeting subsequent to discussions within Doctors Corp.

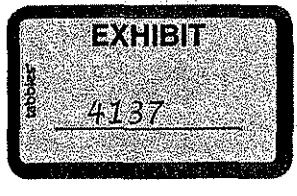
It is the opinion of Doctor's Corp that a win-win, cooperative solution to the problem must be found and will require the strong use of your influence as CEO of SARMC. Most of the demands of the radiologists could be accomplished over time. The following general format could be made to work.

1. Three General Partnership positions could be made available for SARMC, MRI Associates or the hospital partners to purchase. These could be held or resold to the radiologists. Two General Partnership positions would come from Drs. Giles and Henson and the third would be newly created.

2. Drs. Curran, Havlina, and Prochaska are not currently willing sellers but would listen to offers. They have all agreed conceptually to create an agreement whereby they would be bought out at specific times according to some mutually agreeable evaluation mechanism(s) or formula(s). The Hospitals might have to establish rights of refusal and possibly commit some of these to the radiologists.

3. The suggestion by the radiologists to split the two companies is not considered appropriate or desirable at this time It would have to be acceptable to all the hospital partners and the majority of Doctors Corp.

The concerns expressed at the meeting regarding the problems of not having a seamless department would be present regardless of who the owners are. Any solutions available to the radiologists as one of multiple partners could be incorporated under the present ownership. Any valid concerns need to be addressed immediately and are independent of ownership.



The time has come for SARMC to insist on and provide full, supportive radiologic coverage of the lab at historical levels of professionalism and service. These standards are clear nationally and in the SARMC radiology department. Along with the professional interpretation and supervision of the lab comes the obligation to notify the lab/hospital of all deficiencies and safety concerns and to make professional recommendations as to departmental needs, *including new equipment and upgrades required* to maintain the state of the art. This commitment is integral to all radiology professional contracts including the SARMC main department. It cannot be allowed to be withdrawn simply because the radiologists of the lab are now also its competitors. *The highest standard of care for patients is essential and includes* having radiologists on site to supervise studies as needed. We now view as a necessity SARMC's providing the lab with full, supportive, traditional radiologist coverage or permitting the MRI Center of Idaho to contract directly with radiologists as a *fiduciary responsibility of* SARMC to its other general and limited partners. We also see it as our responsibility to point this out.

The MRI partnership has been a model of cooperative networking among multiple hospitals and physicians. This has been accomplished by treating entities fairly and by committing to a win-win approach to networking and problem resolution. The current position of the SARMC contract radiologists creates a real challenge to continuing this tradition. It is not too late to create a mutually workable and beneficial solution. The MRI Center of Idaho has established an exemplary and extraordinary, patient-oriented service whose commitment to excellence has spread to the mobile operation and has benefited quality patient care throughout the Northwest. SARMC made the decision to provide MRI services through the mechanism of this partnership. Your support for the commitments of SARMC to this partnership will be clearly needed to resolve the current impasse.

Sincerely,

James Prochaska, M.D., for Doctors Corp

EXHIBIT I

EXHIBIT I

Gem State Radiology

877 W Main Street, Suite 603 • Boise, Idaho 83702 • tel 208.384.9060 • fax 208.384.9023

August 7, 2002

To: MRI Center of Idaho Scheduling Department, Radiology Scheduling Department
From: Radiologists

Re: Scheduling.

There has been a "mission creep" with respect to the scheduling of cases requiring the administration of intravenous contrast material, and the scheduling of 'after-hours monitored cases'. In addition, critically ill St Alphonsus house patients are often being examined during the late night hours.

We are concerned with this process, and want to reiterate that it cannot be assumed that we are 'immediately available' for care in the case of a contrast reaction, or to provide physician monitoring, for the complicated patients being electively screened after hours. We are asking that all contrast cases after hours be restricted to 'emergent basis' only. House cases requiring nursing care, and physician monitoring be performed during normal working hours. Add on elective cases requiring physician input should appropriately be scheduled at times that we can realistically be expected to be available. (Monday to Friday, 0700-1900). All cases that fall outside of this time frame, (other than routine, non-monitored cases), need to be specifically approved by the On-call Radiologist as an emergent add-on.

Thank you for your time and consideration in this matter.

We will expect implementation of this policy by 8/19/2002.

Sincerely,

J. Tim Hall, MD

EXHIBIT J

EXHIBIT J

MRI of Idaho Special Meeting

Date: September 8, 2003

Present:
Roger Curran, M.D. Chairman
Thomas Henson, M.D.
James Prochaska, M.D
Sandra Bruce, CEO SARMC
Ken Fry, CFO, SARMC
Mark Dalley, CEO Holy Rosary Med. Ctr.
Mark Adams, CEO, West Valley Medical Center, Caldwell .
Joseph Messmer, CEO Mercy Medical Center
Randy Hudspeth, Dir. Professional Practice SARMC
Rick Presnell, Chief Accounting Officer, SARMC
Jack Floyd, CEO MRICI/MRI Mobile
Dr. Scott Henson
Michael Cacchillo, Dir, Bus. Dev. MRICI/MRIM

Guests:
Kevin West, Gen. Counsel MRICI
Patrick Miller, SARMC Counsel
Stephanie Westermeier, SARMC Counsel

Absent:
David Giles, M.D. Medical Director
Jack Havlina, M.D
Andrew Fitzgerald, CFO Holy Rosary Med.Ctr

Recording: Michael Cacchillo

Chairman, Roger Curran opened the special session at 5:09pm, welcoming Sandra Bruce, Ken Fry and the SARMC Counsels as well as Kevin West, MRI Gen. Counsel to the meeting. . With the Radiology agreement discussion as the primary item, Dr. Curran recognized Sandra Bruce and asked that she share the St. Alphonsus Regional Medical Center perspective on the proposed agreement and her positions, insights etc. Sandra produced a single page agenda (see enclosed document) aimed at addressing the current MRI Service Agreement and a discussion of the Long Term Relationship Issues. She then gave an overview of services provided by the radiologists to St. Alphonsus. Ms. Bruce acknowledged the Radiologists time cutback to 12 hours per day, (5) five days per week with emergency coverage. The board brought up the fact that the proposed agreement was for hospital inpatients and hospital outpatients and the Radiologists were not doing off-hour coverage. This meant that 85% of the volume of

MRICI was not being addressed directly. Additionally, after hours Radiologists were not always receptive to handling emergencies. Ms. Bruce requested data with patient names and days of occurrences to allow her to address the rads with the issues.

The board indicated that information was being disseminated that would have local physicians believe that Gem State Radiology/IMI owned the DR system and could dictate exclusivity of what goes on the system and who reads scans. Ms. Bruce said she was unaware of the issues and suggested that a committee be formed of representatives from both St. Al's and MRICI to address the issues. Initial names from St. Al's would be Ken Fry, Carolyn Corbett, Pat Miller and one person from IT. These individuals would be joined by individuals representing MRI of Idaho.

A discussion ensued on the relationship of the Radiologists, technologists and misinformation that was being propagated in the Treasure Valley. (Jack Floyd or Board) sited five items of concern:

1. General review of protocols by Rads as the technology has moved forward but the Radiologists haven't reviewed capabilities and protocols with the technologists to update
2. Mentoring of the technologists with feedback from the Radiologists no longer happens, especially to address concerns by referring physicians
3. The Radiologists periodically express quality concerns regarding MRICI systems and coils, but do not document them for follow-up. In one case, MRI invited and secured a visit by a GE Vice President to address the purported issues but no one from GSR came to meet with him
4. Statements of MRICI software being antiquated in light of purchase and installation of the latest Excite and Quantum software systems have not been dispelled
5. Alleged technology of MRICI Systems not compatible with DR because of inadequate software configuration

Sandra suggested that the issues sited actually lead to the second item on the agenda, that of on-going Long-term relationship issues. She stated that she felt the Relationship of MRI of Idaho and St. Alphonsus no longer worked. She saw the future as an integration effort with her medical staff and physician ownership the direction that St. Al's was heading. She felt that the best resolution would be a St. Al's buy-out of the MRI of Idaho business. At this statement, Sandra produced a document (see enclosure) that she had put together indicating a suggested timeline for the buyback negotiation and valuation process and stated if the transaction did not occur in a timely fashion that one of St. Al's options under the current agreement would be withdrawal from the partnership. She

stated that Ken Fry would lead the negotiations for St. Alphonsus and asked that someone from MRI of Idaho be appointed to represent itself. It was mutually agreed that the Board needed to caucus to review the proposal and to select a team to represent the Center. The special session was brought to a close at 5:39pm and followed immediately by an abbreviated September Board Meeting. See September Board Meeting Minutes.

Jack Floyd, CEO
MRICI/MRI Mobile

J. Roger Curran, M.D. Chairman,
MRICI/MRI Mobile

MRI of Idaho Special Meeting
September 8, 2003
5:00 p.m. to 7:00 p.m.
Sister Patricia Room

ATTENDEES: Andy Fitzgerald; David Giles, MD; Jack Floyd; Jack Havlina, MD; James Prochaska, MD; Joe Messmer, Mark Adams; Mark Dalley; Mike Cacchillo; Roger Curran, MD; S. Henson, MD; Thomas Henson, MD; Randy Hudspeth; Richard Presnell,

GUESTS: Kevin West, Patrick Miller, Stephanie Westermeier, Ken Fry, Sandra Bruce

L. Agenda Item	Time	Presenter	Tool	Outcome/Action
1. MRI Service Agreement	10 Minutes	N/A	Discussion	Appoint negotiation team to resolve issues and set timeline for resolution.
2. Long Term Relationship Issues	45 Minutes	N/A	Discussion	Agreement on next steps.

028046

EXHIBIT K

EXHIBIT K

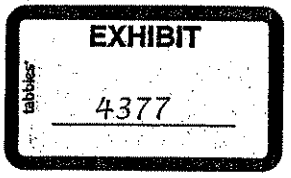
From: Scott Christensen
To: BCC; CT; Front Office; Gen Rad Techs; Nuc Med Group; Nurses; Rad Admin; Rad Asstistants; Specials; Ultrasound
Date: 12/12/05 8:44AM
Subject: Fwd: New MRI Service

FYI

Scott E. Christensen B.S., R.T.(R)
Manager, Radiology and Medical Imaging
Saint Alphonsus R.M.C.
Boise, Idaho 83706
Telephone: (208)-367-6546
FAX: (208)-367-2989
e-mail: scotchri@SARMC.org

>>> Ben Murray 12/11/05 07:48AM >>>
Please see the attached memo and post for all staff - on the new Saint Alphonsus MRI service that begins on Monday, December 19th. More information will be distributed thru the next week.
Also review an earlier email on Inservice programs related t the new monitors and pumps we have purchased for use in the new MRI.

Ben Murray, RN
Director of Nursing
367-6234 (Office)
855-6908 (Beeper)



Saint Alphonsus | INTER OFFICE MEMORANDUM

To: Nurse Managers; All Nursing Staff
From: Ben Murray, RN, MSN, Director of Nursing
Re: New MRI Operations Update
Date: December 11, 2005

As many of you are already aware, a new MRI service is beginning operations on campus on Monday December 19th. As of that date, **Saint Alphonsus MRI will be the sole provider of MRI services for all Saint Alphonsus inpatient, outpatient and ED patients. The Mobile MRI will be located at door S6** near Endoscopy and Preadmission testing. A permanent MRI site is being constructed off the old main lobby, by the former cashiers office, and is expected to be completed in the Fall of 2006. The same fundamental procedures that have always been followed when utilizing MRI services will continue. There are a number of key points that are important for all staff to be aware of:

1) MRI of Idaho will remain on campus as they have a long term lease on their current space. They will continue to serve non Alphonsus outpatients, but **as of December 19th, they will no longer provide services to Saint Alphonsus connected patients.**
2) Gem State Radiology will continue to be responsible for the interpretation of all MRI studies and Saint Alphonsus will partner with Intermountain Medical Imaging in operating the new MRI service.
3) To contact the Mobile MRI regarding ED and inpatients, staff should call 3340 (as of December 19th). Further information about scheduling and contacting the Mobile MRI will be prominently posted in all areas in the next few days. When you enter STARS to process orders, the option that appears will be Saint Alphonsus MRI.
4) **Equipment** - MRI compatible wheelchairs and gurneys have been purchased and will be used for transporting patients. We also have MRI compatible monitors and pumps – see related email of today re. education about the new equipment.
5) **Code Response** – The Mobile unit is equipped with an emergency code response button. If there is a code in the Mobile unit, the code team will respond as usual. The Switchboard will overhead page – "Code Blue, Saint Alphonsus MRI, Door S6". At this time **we will continue to provide code response for patients in the MRI of Idaho** suite. If the switchboard pages a "Code Blue – MRI Center of Idaho", **the code response team should respond as they always have.** All ED and critical care nursing staff will be

able to access the MRI unit using their hospital ID; proximity to the magnet will not harm the ID badge.

6) **Transport** - As per usual, monitored patients will be accompanied by a nurse, who will remain with the patient throughout the procedure. Pediatric patients will be accompanied under the standard terms of security for pediatric patients. If there are any delays at the point of service for critical care patients, they can be housed in the Ambulatory Surgery Center until final clearance to enter the MRI unit has been obtained.
7) **Anesthesia – During the occasional anesthesia procedures** that take place in MRI, **a Saint Alphonsus nurse will accompany and remain with the patient** throughout the procedure. This can be the critical care or ED nurse who is always present anyway, the Radiology staff nurses or other nurses who have been trained in conscious sedation support. MRI staff will coordinate with the unit and the clinical coordinators to arrange the necessary and appropriate nursing support for non critical care patients.
8) **Facility – The Mobile MRI will have a sheltered canopy/ walkway**, with heat and lights, so that patients do not have to go "outside" to enter the unit. The side of the Mobile has a garage door type opening and a lift to bring wheelchair and gurney bound patients into the control room.
9) **Safety** – The same basic safety issues apply, as always, when in proximity to the magnet unit including: **staff do not enter the magnet room itself unless they have specific clearance from the tech on duty;** everyone needs to be mindful of metal objects such a name tag clips, pens, coins and so on; staff should make the MRI techs aware of your own history of pacemaker presence and other issues of possible embedded metal; **follow all instructions of the tech in regards to safety concerns** (see MRI policy online). Further inservice education opportunities will be announced soon.
10) **Outpatients** – All Saint Alphonsus MRI outpatients will be directed to enter thru door S2. They will sign in at Registration and be escorted or directed to the Radiology reception desk. Please assist any visitor who may be searching for either Saint Alphonsus MRI or the MRI of Idaho office.
11) **More information will be forwarded to managers and staff in coming days** – please make sure al such announcements are posted in the units for all staff to see.

ATTORNEYS' EYES ONLY

SARMC01474
DEPARTMENT OF RADIOLOGY